

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF  
TEXAS, DALLAS DIVISION**

**In Re:** Highland Capital Management, L.P. § Case No. 19-34054-SGJ-11

Highland Capital Management Fund Advisors, L.P.

et al §

Appellant §

vs. §

Highland Capital Management, L.P.,

§ 3:21-CV-00538-N

Appellee §

**[1943] Order confirming the fifth amended chapter 11 plan, Entered on 2/22/2021.**

**APPELLANT RECORD  
VOLUME 49**

MUNSCH HARDT KOPF & HARR, P.C.  
Davor Rukavina, Esq.  
Texas Bar No. 24030781  
Julian P. Vasek, Esq.  
Texas Bar No. 24070790  
3800 Ross Tower  
500 N. Akard Street  
Dallas, Texas 75202-2790  
Telephone: (214) 855-7500  
Facsimile: (214) 978-4375

ATTORNEYS FOR HIGHLAND CAPITAL  
MANAGEMENT FUND ADVISORS, L.P. AND  
NEXPOINT ADVISORS, L.P.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor.

)  
) Chapter 11  
)  
)  
) Case No. 19-34054 (SGJ11)  
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)  
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**AMENDED DESIGNATION BY NEXPOINT ADVISORS, L.P. AND HIGHLAND  
CAPITAL MANAGEMENT FUND ADVISORS, L.P.  
OF ITEMS FOR THE RECORD ON APPEAL**

COME NOW Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the “Appellants”), creditors and parties-in-interest in the above styled and numbered bankruptcy case (the “Bankruptcy Case”) of Highland Capital Management, L.P. (the “Debtor”), and, with respect to their *Notice of Appeal* [docket no. 1957], hereby file their *Amended Designation of Items for the Record on Appeal* (the “Designation”) as follows:

| Item                                 | Bankruptcy<br>Docket Number | Description  |
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RESPECTFULLY SUBMITTED this 22d day of March, 2021.

**MUNSCH HARDT KOPF & HARR, P.C.**

By: /s/ Davor Rukavina  
Davor Rukavina, Esq.  
Texas Bar No. 24030781  
3800 Ross Tower  
500 N. Akard Street  
Dallas, Texas 75201-6659  
Telephone: (214) 855-7500  
Facsimile: (214) 855-7584  
Email: [drukavina@munsch.com](mailto:drukavina@munsch.com)

**ATTORNEYS FOR HIGHLAND CAPITAL  
MANAGEMENT FUND ADVISORS, L.P. AND  
NEXPOINT ADVISORS, L.P.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on this the 22d day of March, 2021, true and correct copies of this document were electronically served by the Court's ECF system on parties entitled to notice thereof, including on counsel for the Debtor.

By: /s/ Davor Rukavina  
Davor Rukavina, Esq.

## **EXHIBIT P P P P P**

United States Department of Justice  
Office of the United States Trustee  
1100 Commerce Street  
Dallas, Texas 75242  
(214) 767-1080

Lisa L. Lambert,  
For the United States Trustee

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

|                               |   |                              |
|-------------------------------|---|------------------------------|
| <b>IN RE:</b>                 | § |                              |
|                               | § |                              |
| <b>HIGHLAND CAPITAL</b>       | § | <b>Case No. 19-34054-SGJ</b> |
| <b>MANAGEMENT, L.P.</b>       | § |                              |
|                               | § |                              |
| <b>Debtors-in-Possession.</b> | § | <b>(Chapter 11)</b>          |

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**UNITED STATES TRUSTEE'S MOTION FOR AN ORDER DIRECTING  
THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**

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A hearing will be held on January 21, 2020. The objection and response deadlines will be governed by the Scheduling Order, ECF No. 269. The Court orally denied the U.S. Trustee's request to have this motion considered in connection with any Governance Motion. See Scheduling Order, ECF. No. 269 and transcript.

**TO THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE:**

The United States Trustee for Region 6 moves for an order directing the appointment of a Chapter 11 Trustee based on cause and the best interests of the creditors. 11 U.S.C. § 1104(a).  
The United States Trustee would show:





### Overview

Documented management concerns mandate a trustee in this case. This Court has recognized that Highland's management concerns involve a culture that surpasses the officers and board. Steps such as replacing the board or having a chief restructuring officer who reports to the Court rather do not fix Highland's problems.

Prior efforts to use external oversight to curtail Highland management's self-dealing have failed. As the Acis case demonstrated, the Highland Capital cases have many inter-connected relationships. A trustee can nimbly evaluate whether the inter-company transactions are in the best interests of the estate and creditors. In the Acis case, the trustee concluded other options were either superior, cheaper, or less-conflicted. A board is farther from the impact of the related-entity transactions and the culture of the debtor. It meets periodically. Here, the inter-connected relationships include the Debtor's bank as well as other legal entities.

The remedy Congress defined for these facts is a trustee. The Court should direct the appointment of a trustee.

### Jurisdiction, Power, and Standing

1. The Court has subject matter jurisdiction under 28 U.S.C. § 1334, 28 U.S.C. § 157(a)(1), and the standing order of reference. Appointing a trustee or examiner impacts the case administration and therefore is a core matter that the Court has the power to resolve. 28 U.S.C. § 157(b)(2)(A).
2. The United States Trustee has standing to seek appointment of a trustee or examiner. 11 U.S.C. §§ 307, 1104.



### Facts

*The Acis case involved findings of fraud, self-dealing, and mismanagement by this debtor:*

3. This Court presided over the Acis bankruptcy case, case number 18-30264. In *Acis*, the Court catalogued the decision-making authority as belonging to James Dondero, as president; Mark K. Akada, chief investment officer with a decreasing role; Frank Waterhouse, as treasurer; and –by delegation of authority – Highland in-house counsel Scott Levington and Isaac Leventon. With the exception of Mark K. Akada, the same individuals have decision-making authority for the debtor-in-possession. *In re Acis Capital Mgmt., Inc.*, 584 B.R. 115, 119, 131. The Court found the Acis witnesses’ testimony “of questionable reliability and, oftentimes, there seemed to be an effort to convey plausible deniability.” *Acis*, 584 B.R. at 131.

4. “[S]ince the arbitration award [in favor of Terry, the petitioning creditor], there has been a calculated effort (largely by Highland) to effectively liquidate the Alleged [Acis] Debtors.” *Acis*, 584 B.R. at 148. The Court found the Alleged Debtors were “really out to protect –Highland and Highland-affiliates” in contravention of their fiduciary duties of loyalty. *Acis*, 584 B.R. at 149.

5. In addition to finding breaches of fiduciary duty when Highland promoted its self-interests over those of Acis creditors, the Court found “evidence of both intentional and constructive fraudulent transfers.” *In re Acis Capital Mgmt., L.P.*, 2019 WL 417149, at \*11 (confirmation opinion also referencing “actual intent to hinder, delay, or defraud”).

6. After the Court directed the appointment of the Acis chapter 11 trustee, the chapter 11 trustee found service providers unrelated to Highland entities. These providers were cheaper and decreased conflicts.

[illegible]

*Prior Efforts to Cabin Highland Capital Management's Self-Dealing and Other Willful and Intentional Acts Have Failed.*

14. Highland has been found to engage in self-dealing and other misconduct for years. The prior efforts to remediate and change the culture have failed.

15. In 2014, the SEC determined that Highland had historically engaged in multiple transactions in its client advisory accounts without disclosing that Highland was acting as principal or obtaining client consent before the trades were completed. The SEC required

Highland to retain an outside compliance consultant and to implement that consultant's recommendations.

16. [REDACTED]

17. Cumulatively, the findings of this Court and other tribunals establish that the problems exist in the management culture at Highland. These problems go beyond the officers and directors.

18. The general partner of Highland is controlled by Dondero.

19. Moreover, the integrated nature of the board for Highland-related entities allows for the possibility that individuals removed from the board and from management may still monitor the financial transactions and use their relationships with the Highland's employees to direct outcomes. For example, Highland proposes to bank, in part, with NexBank. The NexBank website reflects that Dondero chairs the board and Okada is a director. Similarly, Highland Management, the debtor, has intercompany transactions with Highland Capital Management Korea Limited, Highland Capital Management Latin America, L.P., and Highland Capital Management (Singapore) Pte Ltd.

### Legal Analysis and Argument

20. The United States Trustee is charged with monitoring the federal bankruptcy system. *See* 28 U.S.C. § 586(a)(3); *see also United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)* 33 F.3d 294, 295-96 (3d Cir. 1994).

21. Before confirmation, the Court "shall order the appointment of a trustee . . . for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, *either before or after* the commencement of the case, or similar



cause.” 11 U.S.C. §1104(a)(1) (emphasis added). In addition, by adding appointment of a trustee as a remedy in section 1112, “cause” also may be factors traditionally resulting in dismissal or conversion. 11 U.S.C. §1112(b)(1). Here, an additional factor is “bad faith.” Alternatively, the Court must appoint a trustee “if such appointment is in the interest of the creditors, any equity security holders, and other interests of the estate.” 11 U.S.C. § 1104(a)(2).

22. The Fifth Circuit has indicated that the burden of proof for the appointment of a trustee is “clear and convincing” evidence, but the Court later adopted the dissent’s opinion. *Cajun Elec. Co. v. Louisiana Elec. Co. (In re Cajun Electric Power Co-Op, Inc.)*, 69 F.3d 746, *on reh’g*, 74 F.3d 599 (5th Cir. 1996) (adopting dissent).<sup>1</sup>

23. The duties of a trustee are defined in section 1106, and the Court has the ability to tailor some of them. 11 U.S.C. § 1106(a).

24. The “cause” to appoint an examiner or a trustee may be a reason other than the enumerated factors. *Oklahoma Ref. Co. v. Blaik (In re Oklahoma Ref. Co.)*, 838 F.2d 1133, 1136 (10th Cir. 1988); *cf. Little Creek Dev. Corp. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Corp.)*, 779 F.2d 1068, 1072 (5th Cir. 1986) (defining “cause” in context of dismissal statute).

25. For example, courts have appointed trustees or examiners when the debtor’s insiders have conflicts of interest arising from the sale of the Debtor’s assets. In *Cajun Electric*, the Fifth Circuit affirmed the appointment of a trustee, in part, because the co-operative members

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<sup>1</sup> In *Grogan v. Garner*, the United States Supreme Court held that the burden of proof for dischargeability fraud actions was preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). In reaching this holding, the Supreme Court cataloged both bankruptcy and non-bankruptcy fraud statutes and held that Congress generally imposed a preponderance standard for fraud in civil proceedings.

were interested in purchasing part or all of Cajun Electric's assets. *Cajun Elec. Power Cooperative, Inc. v. Central Louisiana Elec. Co., Inc. (In re Cajun Elec. Power Cooperative, Inc.)*, 69 F.3d 746, 751 (5th Cir. 1995) (Garza, J., dissenting), *adopted as majority opinion on reh'g*, 74 F.3d 599 (5th Cir. 1996). The Fifth Circuit held that "a trustee may be the only effective way to pursue reorganization" when the management has cross-purposes. *Cajun Elec.*, 69 F.2d at 751.

*Cause exists to appoint a chapter 11 trustee:*

26. Here, both express statutory standards and the common law case standards for "cause" exist. Specifically, "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor" and bad faith exist under the facts of this case.<sup>2</sup>

27. The record regarding a series of self-dealing categories reflects both incompetence and gross mismanagement. *SEC Judgment*, pp. 5-7.

28. Other "cause" exists to appoint a trustee because tribunals have historically found the management's testimony unreliable and the Debtor's actions as reflecting willfulness and intent. This Court has found that the Debtor's management had fraudulent intent when it removed assets from Acis.

*It is in the best interests of creditors to appoint a chapter 11 trustee.*

29. Appointment of chapter 11 trustee is also in the interests of creditors, equity security holders, and other interests of the estate. The Court should direct the appointment of a chapter 11 trustee to serve the "interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. §1104(a)(2).

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<sup>2</sup> "The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive officer . . . participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting." 11 U.S.C. §1104(e).



30. First, it is in the best interest of the creditors to have an independent trustee to assume control over the estate in order to evaluate any alter ego claims, avoidance actions, and other tort claims.

31. Second, it is in the best interest of the creditors and other parties-in-interest to have accurate financial information. Accurate financial information ensures parties understand the facts of the case and avoids post-petition liabilities for violations. Like the information provided to investors in securities filings, the information provided in a bankruptcy case depends on affirmative disclosure.

32. Other efforts to check or monitor the Debtor's management have failed. The Acis trustee's actions reflect a need to be able to bid competing services and replace related-entities when conflicts of interest or cost concerns arise.

33. Congress has defined the remedy for the facts of this case. "The court shall order the appointment of a trustee." 11 U.S.C. § 1104(a).

### Conclusion

For the foregoing reasons, the United States Trustee requests the Court to

- a order the United States Trustee to appoint a Chapter 11 Trustee; or
- b grant to the United States Trustee such other and further relief as is just and proper.

Dated: December 23, 2019

Respectfully Submitted,  
WILLIAM T. NEARY  
UNITED STATES TRUSTEE

/s/Lisa L. Lambert

Lisa L. Lambert  
Asst. U.S. Trustee, TX 11844250 (and NY)  
Office of the United States Trustee  
1100 Commerce St. Room 976  
Dallas, Texas 75242  
(214) 767-1080  
[Lisa.L.Lambert@usdoj.gov](mailto:Lisa.L.Lambert@usdoj.gov)

### Certificate of Service

I certify that on December 23, 2019, I sent copies of the foregoing document on to the attached service lists by first class United States mail and by ECF notification to those listed below.

/s/ Lisa L. Lambert

Lisa L. Lambert

**Highland Capital Management**

300 Crescent Court  
Suite 700  
Dallas, TX 75201

**Kurtzman Carson Consultants**

Joe Morrow  
222 N. Pacific Coast Hwy Ste 300  
El Segundo, CA 90245

**Pachulski Stang Ziehl & Jones LLP**

John A. Morris and Gregory V. Demo

780 Third Avenue, 34th Floor  
New York, NY 10017-2024

**Blank Rome LLP**

John E. Lucian, Josef W. Mintz  
1201 N. Market Street, Suite 800  
Wilmington, DE 19801

**Cole, Schotz, Meisel, Forman & Leonard,  
P.A.**

Michael D. Warner, Esq.  
301 Commerce Street, Suite 1700  
Fort Worth, TX 76102

**Dentons US LLP**

Lauren Macksoud, Esq.  
1221 Avenue of the Americas  
New York, NY 10020-1089

**Frost Brown Todd LLC**

Mark A. Platt  
100 Crescent Court, Suite 350  
Dallas, TX 75201

**Hunter Mountain Investment Trust**

c/o Rand Advisors LLC  
John Honis  
87 Railroad Place Ste 403  
Saratoga Springs, NY 12866

**Internal Revenue Service**

Centralized Insolvency Operation  
2970 Market St  
Philadelphia, PA 19104

**Jefferies LLC**

Office of the General Counsel  
520 Madison Avenue, 16th Floor  
Re: Prime Brokerage Services  
New York, NY 10022

**Pachulski Stang Ziehl & Jones LLP**

Richard M. Pachulski, Jeffrey N. Pomerantz,  
Ira D. Kharasch, Maxim B. Litvak, James E.  
O'Neill  
919 North Market Street  
17th Floor  
Wilmington, DE 19801

**Hayward & Associates PLLC**

Melissa S. Hayward, Zachery Z. Annable  
10501 N. Central Expy, Ste. 106  
Dallas, TX 75231

**Ashby & Geddes, P.A.**

William P. Bowden, Esq., Michael D.  
DeBaecke, Esq.  
500 Delaware Avenue, 8th Floor  
P.O. Box 1150  
Wilmington, DE 19899-1150

**Carlyon Cica Chtd.**

Candace C. Carlyon, Esq., Tracy M. Osteen,  
Esq.  
265 E. Warm Springs Road, Suite 107  
Las Vegas, NV 89119

**Condon Tobin Sladek Thornton PLLC**

J. Seth Moore  
8080 Park Lane, Suite 700  
Dallas, TX 75231

**Dentons US LLP**

Patrick C. Maxcy, Esq.  
233 South Wacker Drive  
Suite 5900  
Chicago, IL 60606-6361

**Gibson, Dunn & Crutcher LLP**

Marshall R. King, Esq., Michael A. Rosenthal,  
Esq. & Alan Moskowitz, Esq.  
200 Park Avenue  
New York, NY 10066

**Internal Revenue Service**

Attn Susanne Larson  
31 Hopkins Plz Rm 1150  
Baltimore, MD 21201

**Jackson Walker L.L.P.**

Michael S. Held  
2323 Ross Avenue, Suite 600  
Dallas, TX 75201

**Jenner & Block LLP**

Marc B. Hankin, Richard Levin  
919 Third Avenue  
New York, NY 10022-3908

**Pachulski Stang Ziehl & Jones LLP**

Richard M. Pachulski, Jeffrey N. Pomerantz,  
Ira D. Kharasch, Maxim B. Litvak, James E.  
O'Neill  
10100 Santa Monica Blvd, 13th Floor  
Los Angeles, CA 90067

**Pachulski Stang Ziehl & Jones LLP**

Maxim B. Litvak  
150 California Street, 15th Floor  
San Francisco, CA 94111-4500

**BBVA**

Michael Doran  
8080 North Central Expressway  
Suite 1500  
Dallas, TX 75206

**Chipman, Brown, Cicero & Cole, LLP**

Mark L. Desgrosseilliers  
Hercules Plaza  
1313 North Market Street, Suite 5400  
Wilmington, DE 19801

**Cross & Simon LLC**

Michael L. Vild, Esquire  
1105 N. Market Street, Suite 901  
Wilmington, DE 19801

**Frontier State Bank**

Attn: Steve Elliot  
5100 South I-35 Service Road  
Oklahoma City, OK 73129

**Gibson, Dunn & Crutcher LLP**

Matthew G. Bouslog, Esq.  
3161 Michelson Drive  
Irvine, CA 92612

**Internal Revenue Service**

Centralized Insolvency Operation  
PO Box 7346  
Philadelphia, PA 19101-7346

**Jefferies LLC**

Director of Compliance  
520 Madison Avenue, 16th Floor  
Re: Prime Brokerage Services  
New York, NY 10022

**Kane Russell Coleman Logan PC**

John J. Kane  
901 Main Street, Suite 5200  
Dallas, TX 75242-1699

**KeyBank National Association**  
as Administrative Agent  
225 Franklin Street, 18th Floor  
Boston, MA 02110

**KeyBank National Association**  
as Agent  
127 Public Square  
Cleveland, OH 44114

**Kurtzman Steady, LLC**  
Jeffrey Kurtzman, Esq.  
401 S. 2nd Street, Suite 200  
Philadelphia, PA 19147

**Latham & Watkins LLP**  
Asif Attarwala  
330 N. Wabash Avenue, Ste. 2800  
Chicago, IL 60611

**Latham & Watkins LLP**  
Jeffrey E. Bjork  
355 South Grand Avenue, Ste. 100  
Los Angeles, CA 90071

**Linebarger Goggan Blair & Sampson LLP**  
Elizabeth Weller, Laurie A. Spindler  
2777 N. Stemmons Freeway  
Suite 1000  
Dallas, TX 75207

**Lynn Pinker Cox & Hurst, L.L.P.**  
Michael K. Hurst, Esq.  
2100 Ross Avenue, Ste 2700  
Dallas, TX 75201

**Mark K. Okada**  
300 Crescent Court  
Suite 700  
Dallas, TX 75201

**Morris, Nichols, Arsht & Tunnell LLP**  
Curtis S. Miller, Kevin M. Coen  
1201 North Market Street, Suite 1600  
Wilmington, DE 19801

**Morrison Cohen LLP**  
Joseph T. Moldovan, Esq. & Sally Siconolfi,  
Esq.  
909 Third Avenue  
New York, NY 10022

**NexBank**  
John Danilowicz  
2515 McKinney Ave  
Ste 1100  
Dallas, TX 75201

**Nixon Peabody LLP**  
Louis J. Cisz, III, Esq.  
One Embarcadero Center, 32nd Floor  
San Francisco, CA 94111

**Office of General Counsel**  
Securities & Exchange Commission  
100 F St NE  
Washington, DC 20554

**Office of the Attorney General**  
Ken Paxton  
300 W. 15th Street  
Austin, DE 78701

**Office of the Attorney General**  
Main Justice Building, Room 5111  
10th & Constitution Avenue, N.W.  
Washington, DC 20530

**Office of the United States Attorney**  
Erin Nealy Cox, Esquire  
1100 Commerce Street, 3rd Floor  
Dallas, TX 75202

**Office of the United States Trustee**  
Lisa L. Lambert, Esquire  
1100 Commerce Street, Room 976  
Earle Cabell Federal Building  
Dallas, TX 75242

**Pension Benefit Guaranty Corporation**  
Michael I. Baird  
Office of the General Counsel  
1200 K Street, N.W.  
Washington, DC 20005-4026

**Perdue, Brandon, Fielder, Collins & Mott,  
LLP.**  
Linda D. Reece  
1919 S. Shiloh Rd., Suite 310  
Garland, TX 75042

**Potter Anderson & Corroon LLP**  
Jeremy W. Ryan, Esq., R. Stephen McNeill,  
Esq. & D. Ryan Slaugh, Esq.  
1313 North Market Street, 6th Floor  
Wilmington, DE 19801

**Prime Brokerage Services**  
Jefferies LLC  
520 Madison Avenue  
New York, NY 10022

**Pronske & Kathman, P.C.**  
Jason P. Kathman  
2701 Dallas Parkway, Suite 590  
Plano, TX 75093

**Richards, Layton & Finger PA**  
Michael J. Merchant, Sarah E. Silveira  
One Rodney Square  
920 North King Street  
Wilmington, DE 19801

**Schulte Roth & Zabel LLP**  
James T. Bentley  
919 Third Avenue  
New York, NY 10022

**Securities & Exchange Commission**  
Andrew Calamari, Regional Director  
New York Regional Office  
Brookfield Place, Suite 400  
200 Vesey Street  
New York, NY 10281

**Securities & Exchange Commission**  
Sharon Binger, Regional Director  
Philadelphia Regional Office  
One Penn Center, Suite 520  
1617 JFK Boulevard  
Philadelphia, PA 19103

**Sidley Austin LLP**  
Bojan Guzina, Matthew Clemente, Alyssa  
Russell, Elliot A. Bromagen  
One South Dearborn Street  
Chicago, IL 60603

**Sidley Austin LLP**  
Jessica Boelter  
787 Seventh Avenue  
New York, NY 10019

**Sidley Austin LLP**  
Lee S. Attanasio, Esq.  
787 Seventh Avenue  
New York, NY 10019

**Sidley Austin LLP**  
Penny P. Reid, Paige Holden Montgomery,  
Charles M. Person, Juliana Hoffman  
2021 McKinney Avenue Suite 2000  
Dallas, TX 75201

**State Comptroller of Public Accounts**

Revenue Accounting Division-  
Bankruptcy Section  
P.O. Box 13258  
Austin, TX 78711

**State of Delaware**

Division of Corporations - Franchise Tax  
401 Federal Street  
PO Box 898  
Dover, DE 19903

**Strand Advisors, Inc.**

300 Crescent Court  
Suite 700  
Dallas, TX 75201

**Sullivan Hazeltine Allinson LLC**

William A. Hazeltine, Esq.  
901 North Market Street, Suite 1300  
Wilmington, DE 19801

**Texas Attorney General's Office**

Bankruptcy-Collections Division  
P.O. Box 12548  
Austin, TX 78711-2548

**The Dugaboy Investment Trust**

300 Crescent Court  
Suite 700  
Dallas, TX 75201

**The Mark and Pamela Okada Family Trust –  
Exempt Trust #1**

300 Crescent Court  
Suite 700  
Dallas, TX 75201

**The Mark and Pamela Okada Family Trust –  
Exempt Trust #2**

300 Crescent Court  
Suite 700  
Dallas, TX 75201

**U.S. Department of the Treasury**

Office of General Counsel  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

**United States Attorney General**

U.S. Department of Justice  
William Barr, Esquire  
950 Pennsylvania Avenue, NW,  
Room 4400  
Washington, DC 20530-0001

**Winstead PC**

Rakhee V. Patel, Phillip Lamberson  
2728 N. Harwood Street, Suite 500  
Dallas, TX 75201

**Young Conaway Stargatt & Taylor, LLP**

Michael R. Nestor, Edmon L. Morton, Sean M.  
Beach, Esq., Jaclyn C. Weissgerber, Esq.  
Rodney Square  
1000 North King Street  
Wilmington, DE 19801

**Zillah A. Frampton**

Bankruptcy Administrator  
Delaware Division of Revenue  
Carvel State Office Building, 8th Floor  
820 N. French Street  
Wilmington, DE 19801

## **EXHIBIT QQQQQQ**






CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 4, 2020

  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,<sup>1</sup>

Debtor.

§  
§  
§  
§  
§  
§

Chapter 11

Case No. 19-34054-sgj 1

Related to Docket Nos. 271, 362, 364

**ORDER DENYING UNITED STATES TRUSTEE'S MOTION  
FOR AN ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE**

Upon the *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Docket No. 271] (the "Motion"), filed by the United States Trustee for Region 6 (the "UST") on December 23, 2019; and this Court having considered the objections to the Motion [Docket Nos. 362 and 364] filed by Highland Capital Management, L.P., the debtor and

<sup>1</sup> The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



debtor in possession herein (the “Debtor”) and the Official Committee of Unsecured Creditors, respectively; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that no cause exists under 11 U.S.C. § 1104(a)(1) for the appointment of a chapter 11 trustee in this case and that the relief requested in the Motion is not in the best interests of the Debtor’s estate or parties in interest for purposes of 11 U.S.C. § 1104(a)(1); and this Court having read the findings of fact and conclusions of law into the record in accordance with Fed. R. Bankr. P. 7052(a); and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT:**

1. The Motion is **DENIED**.
2. Notwithstanding any stay under applicable rules, this Order shall be effective immediately upon entry.
3. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order.

**### END OF ORDER ###**

## **EXHIBIT RRRRRR**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
 ) Chapter 11  
 )  
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) January 9, 2020  
 ) 9:30 a.m. Docket  
Debtor. )  
 ) DEBTOR'S MOTION TO COMPROMISE  
 ) CONTROVERSY WITH OFFICIAL  
 ) COMMITTEE OF UNSECURED  
 ) CREDITORS [281]  
 )

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtor: Jeffrey N. Pomerantz  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd.,  
13th Floor  
Los Angeles, CA 90067-4003  
(310) 277-6910

For the Debtors: Ira D. Kharasch  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd.,  
13th Floor  
Los Angeles, CA 90067-4003  
(310) 277-6910

For the Debtor: John A. Morris  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

For the Debtors: Melissa S. Hayward  
Zachery Z. Annable  
HAYWARD & ASSOCIATES, PLLC  
10501 N. Central Expressway,  
Suite 106  
Dallas, TX 75231  
(972) 755-7104

1 APPEARANCES, cont'd.

2 For the Official Committee Matthew A. Clemente  
3 of Unsecured Creditors: Dennis M. Twomey  
4 SIDLEY AUSTIN, LLP  
5 One South Dearborn Street  
6 Chicago, IL 60603  
7 (312) 853-7539

8 For the Official Committee Penny P. Reid  
9 of Unsecured Creditors: SIDLEY AUSTIN, LLP  
2021 McKinney Avenue, Suite 2000  
10 Dallas, TX 75201  
11 (214) 981-3413

12 For the Issuer Group: James T. Bentley  
13 (Telephonic) SCHULTE ROTH & ZABEL, LLP  
919 Third Avenue  
14 New York, NY 10022  
15 (212) 756-2000

16 For the Issuer Group: James E. Bain  
17 (Telephonic) JONES WALKER, LLP  
811 Main Street, Suite 2900  
18 Houston, TX 77002  
19 (713) 437-1820

20 For Acis Capital Rakhee V. Patel  
21 Management GP, LLC: Annmarie Antoinette Chiarello  
22 WINSTEAD, P.C.  
2728 N. Harwood Street, Suite 500  
23 Dallas, TX 75201  
24 (214) 745-5250

25 For Redeemer Committee of Terri L. Mascherin  
the Highland Crusader JENNER & BLOCK, LLP  
Fund: 353 N. Clark Street  
(Telephonic) Chicago, IL 60654-3456  
(312) 923-2799

For Redeemer Committee of Mark B. Hankin  
the Highland Crusader JENNER & BLOCK, LLP  
Fund: 919 Third Avenue  
(Telephonic) New York, NY 10022-3098  
(212) 891-1600

1 APPEARANCES, cont'd.:

2 For the U.S. Trustee:

Lisa L. Lambert  
Meredyth A. Kippes  
OFFICE OF THE UNITED STATES  
TRUSTEE  
1100 Commerce Street, Room 976  
Dallas, TX 75242  
(214) 767-8967

6 For Jefferies, LLC:  
(Telephonic)

Patrick C. Maxcy  
DENTONS US, LLP  
233 South Wacker Drive, Suite 5900  
Chicago, IL 60606-6361  
(312) 876-8000

9 For Patrick Daugherty,  
Pro Se:

Patrick Daugherty

10 Recorded by:

Hawaii S. Jeng  
UNITED STATES BANKRUPTCY COURT  
1100 Commerce Street, 12th Floor  
Dallas, TX 75242  
(214) 753-2006

14 Transcribed by:

Kathy Rehling  
311 Paradise Cove  
Shady Shores, TX 76208  
(972) 786-3063

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1                   DALLAS, TEXAS - JANUARY 9, 2020 - 9:56 A.M.

2                   THE COURT: All right. Let's roll to Highland now.  
3 Let's get appearances from lawyers in the courtroom, please.

4                   MR. POMERANTZ: Good morning, Your Honor. Jeff  
5 Pomerantz; Pachulski Stang Ziehl & Jones. Happy New Year,  
6 Your Honor.

7                   THE COURT: Happy New Year.

8                   MR. POMERANTZ: Here on behalf of the Debtor.

9                   THE COURT: Okay. Thank you.

10                  MS. HAYWARD: Good morning, Your Honor. Melissa  
11 Hayward and Zachery Annable on behalf of the Debtor.

12                  THE COURT: Good morning.

13                  MS. LAMBERT: Lisa Lambert, and I think Ms. Kippes  
14 will be joining me, representing William Neary, the United  
15 States Trustee.

16                  THE COURT: Thank you.

17                  MS. CHIARELLO: Good morning, Your Honor. Annmarie  
18 Chiarello and Rakhee Patel here on behalf of Acis Capital  
19 Management, LP and Acis Capital Management GP, LLC.

20                  THE COURT: Thank you.

21                  MR. CLEMENTE: Good morning, Your Honor. Matthew  
22 Clemente from Sidley Austin on behalf of the Official  
23 Committee of Unsecured Creditors. With me today are my  
24 partners Dennis Twomey and Penny Reid.

25                  THE COURT: Okay. Good morning. All right. Is that

1 all of the courtroom appearances?

2 All right. We have several people on the phone. I think  
3 most of them are just listening in. If you're on the phone,  
4 though, and you wish to appear, you may do so at this time.

5 MR. BENTLEY: Good morning, Your Honor. This is  
6 James Bentley of Schulte Roth & Zabel. Also on the line is my  
7 co-counsel, Joseph Bain of Jones Walker. We represent the  
8 Issuers.

9 THE COURT: Okay. Good morning.

10 MS. MASCHERIN: Good morning, Your Honor. This is --

11 MR. MAXCY: Good morning. Patrick --

12 MS. MASCHERIN: Good morning, Your Honor. This is  
13 Terri Mascherin of Jenner & Block. Also on the line with me  
14 is my partner, Mark Hankin. We represent the Redeemer  
15 Committee of the Highland Crusader Fund, which is one of the  
16 members of the Unsecured Creditors' Committee.

17 THE COURT: Okay. Good morning.

18 MR. MAXCY: Good morning, Your Honor. This is  
19 Patrick Maxcy from Dentons US, LLP on behalf of Jefferies,  
20 LLC.

21 THE COURT: Okay. Thank you. All right. Well, I  
22 guess that is it for the phone appearances.

23 Mr. Pomerantz, we're -- we have just one matter on the  
24 calendar, the motion to compromise with the Committee. I saw  
25 two limited objections, and then a U.S. Trustee's broader

1 objection. I'll start with, Do you have any of these  
2 objections worked out?

3 MR. POMERANTZ: Yes, we do.

4 THE COURT: Okay.

5 MR. POMERANTZ: We believe we have the Jefferies  
6 objection worked out, as well as the objection of the Issuers.  
7 And I'll, during the course of my presentation, alert Your  
8 Honor to how that's worked out.

9 THE COURT: Okay.

10 MR. POMERANTZ: And then we'll have a revised order  
11 that basically addresses each of their concerns, or at least  
12 Jefferies' concerns, but the statements on the record for the  
13 Issuers' concerns.

14 THE COURT: Okay. Very good.

15 MR. POMERANTZ: Good morning again, Your Honor. Jeff  
16 Pomerantz; Pachulski, Stang, Ziehl & Jones. I'm joined in the  
17 courtroom by Ira Kharasch, Greg Demo, and John Morris from my  
18 office. I would also like to introduce the Court to the  
19 proposed new members of the board of directors of Strand  
20 Advisors, which is the Debtor's general partner. They're all  
21 sitting in the first row behind counsel's well. And that's  
22 Mr. James Seery, --

23 THE COURT: Good morning.

24 MR. POMERANTZ: -- Mr. John Dubel, --

25 THE COURT: Good morning.

1 MR. POMERANTZ: -- and the Honorable Russell Nelms.

2 THE COURT: Yes. I've met him before.

3 MR. POMERANTZ: As have we. We thought you would  
4 remember him.

5 The resumes of Mr. Seery and Mr. Dubel were attached to  
6 the motion filed on December 27th, and those two resumes and  
7 the resume of the Honorable Judge Nelms were attached to the  
8 reply that was filed last evening. And while Mr. Seery and  
9 Mr. Dubel may be new names to Your Honor, we know that you are  
10 familiar with Judge Nelms, who sat with you in this district.

11 THE COURT: Uh-huh.

12 MR. POMERANTZ: Also in the courtroom, Your Honor, is  
13 Brad Sharp, the Debtor's chief restructuring officer from DSI,  
14 --

15 THE COURT: Good morning.

16 MR. POMERANTZ: -- and his colleague, Fred Caruso,  
17 who spends most of his working hours at the Debtor's Dallas  
18 headquarters.

19 THE COURT: Good morning.

20 MR. POMERANTZ: We have the declaration of Mr. Sharp  
21 that we would move into evidence at this point in time.

22 THE COURT: All right. I've got a stack of paper.  
23 If you have an extra copy for me to use, --

24 MS. HAYWARD: Your Honor, may I approach with the --

25 THE COURT: You may.

1 MS. HAYWARD: Your Honor, it was filed, the  
2 declaration was filed. I'm not sure that we have a copy of --

3 MR. POMERANTZ: Your Honor, we will also at the  
4 appropriate time during my presentation, I'll bring up to Your  
5 -- ask to bring up to Your Honor revisions to the term sheet  
6 that was attached to the motion.

7 THE COURT: Okay.

8 MR. POMERANTZ: Copies have been given to Ms. Lambert  
9 as well as the Committee.

10 THE COURT: Okay. Very good. All right. Well, what  
11 was handed to me was the preliminary term sheet as well as the  
12 CVs for the proposed new board members. I don't see the  
13 declaration --

14 MR. POMERANTZ: Your Honor, if I may approach, I have  
15 a copy.

16 THE COURT: You may. All right. Very good.

17 MR. POMERANTZ: So we would move that declaration  
18 into evidence.

19 THE COURT: All right. The Court will admit this.  
20 It was filed on the docket at 327, but I will additionally  
21 admit it as Exhibit 1 today.

22 (Debtor's Exhibit 1 is received into evidence.)

23 THE COURT: At some point in time, I want to give  
24 parties the opportunity to cross-examine Mr. Sharp. Do you  
25 want to do that now, or shall we hear an opening statement?

1 MR. POMERANTZ: However Your Honor prefers. I mean,  
2 maybe it's helpful to hear argument first, and then, before  
3 the Trustee --

4 THE COURT: I think I'd like to hear opening  
5 statements and then we'll --

6 MR. POMERANTZ: Thank you.

7 THE COURT: -- make the opportunity available. Okay.

8 OPENING STATEMENT ON BEHALF OF THE DEBTOR

9 MR. POMERANTZ: Your Honor, by way of background, we  
10 appeared before Your Honor on December 6th and December 19th.  
11 And during each of those hearings, we described for the Court  
12 negotiations that were underway between the Committee and the  
13 Debtor which, if successful, would have -- would eliminate the  
14 need for contested and uncertain and costly litigation  
15 regarding the appointment of a Chapter 11 trustee and really  
16 put this case in a position where the Debtor and the Committee  
17 would be able to work together constructively towards  
18 negotiation of a plan.

19 As a result of our hearing on December 19th, Your Honor  
20 entered a scheduling order that set deadlines for either the  
21 filing of a motion to approve a settlement, or alternatively,  
22 the filing of one or more motions for the appointment of a  
23 trustee.

24 As set forth and required by the scheduling order, we  
25 filed our motion on December 27th, and in that motion we



1 sought approval of a term sheet and ancillary documents  
2 between the Debtor and the Committee, which I'll describe  
3 shortly.

4 While a couple of items had not yet been agreed to at the  
5 time the motion was filed, I'm pleased to report that over the  
6 last couple of days we've been able to reach closure with the  
7 Committee with respect to those items, and there would also be  
8 some modifications to the term sheet, which I'll go through in  
9 a few moments.

10 The motion, Your Honor, seeks approval of the term sheet,  
11 which accomplishes a variety of things that, again, will allow  
12 the Debtor and the Committee to put the acrimony that has  
13 existed in this case for the first three months behind us and  
14 allow us to focus on productive matters. In the last 24  
15 hours, as I mentioned, there have been a few changes to the  
16 term sheet that I will describe. And I would like to hand up  
17 Your Honor a redline and a clean copy of the revised term  
18 sheet and exhibits. May I approach?

19 THE COURT: All right. You may. Do you have an  
20 extra for the law clerk? Okay. Thank you.

21 (Pause.)

22 MR. POMERANTZ: Your Honor, the term sheet does a  
23 number of things. Would you like me to give Your Honor some  
24 time to look through the redlines?

25 THE COURT: No. You may proceed.

1 MR. POMERANTZ: Okay. The term sheet does a number  
2 of things. The first thing the term sheet does is appointment  
3 of an independent board at Strand Advisors. Strand Advisors  
4 is the GP of the Debtor. The Debtor is an LP. The Debtor  
5 previously had filed a motion to approve the retention of Brad  
6 Sharp as the chief restructuring officer, and that initial  
7 agreement and motion contain details regarding the scope of  
8 Mr. Sharp's authority and the scope of what the Debtor could  
9 do without Mr. Sharp's prior consent.

10 The Committee raised concerns that the structure was not  
11 sufficient to ensure that decisions were being made for the  
12 Debtor only in their best interests and without any  
13 inappropriate influence from Mr. Dondero.

14 To address the Committee's concerns, a focal point of the  
15 settlement was the Debtor's agreement to appoint an  
16 independent board of directors at Strand who would be  
17 responsible for managing the operations of the Debtor.

18 Over the last few weeks, a principal aspect of the  
19 negotiations between the Committee and the Debtor have been  
20 discussing who should the independent directors be.  
21 Conceptually, the Debtor and the Committee both agreed that  
22 the board should include, first, a person with significant  
23 industry experience in which the Debtor operates -- hedge  
24 funds, money management; second, a person with deep  
25 restructuring experience from the financial advisor side; and

1 third, a person with some sort of judicial or governmental  
2 experience.

3 The Debtor originally provided the Committee with three  
4 proposed candidates. The Committee considered the Debtor's  
5 request, but instead presented the Debtor with four different  
6 candidates and asked the Debtor to choose from those four.  
7 The Debtors interviewed each of those people and ultimately  
8 agreed on Messrs. Dubel and Seery, who were each on the  
9 original list.

10 As of the deadline to file the motion on December 27th,  
11 the Committee and the Debtor had still not agreed on the  
12 identity of the third board member, but the parties were  
13 hopeful that an agreement could ultimately be reached and we  
14 decided to go ahead and file the motion. As I'm sure Your  
15 Honor saw in the motion, it was contingent upon everyone  
16 agreeing on the third board member.

17 Ultimately, the Debtor and the Committee both agreed that  
18 Mr. Dubel and Mr. Seery could identify the third board member  
19 out of a pool of four people: Two of the people originally  
20 requested by the Committee and two people identified by the  
21 Debtor. This week and over the weekend, Mr. Seery and Mr.  
22 Dubel interviewed each of the four candidates, and ultimately  
23 decided on the appointment of Judge Nelms as the third  
24 independent board member.

25 The board, as it will be constituted going forward, in the

1 Debtor's opinion, consists of three exceptional individuals  
2 who are independent of the Debtor, have a sterling reputation  
3 in the community, and bring to the Debtor a variety of the  
4 skills that we believe, and believe the Committee agrees,  
5 gives the Debtor the best opportunity to achieve a consensual  
6 restructuring and otherwise manage the affairs of the Debtor  
7 in the best interests of the stakeholders.

8 It is contemplated that the Debtor will continue to retain  
9 the services of DSI as the chief restructuring officer, and  
10 ultimately the board will determine if it's important to  
11 retain a CEO going forward.

12 The second thing that the term sheet does, Your Honor, was  
13 the removal of Mr. Dondero as an officer and director of  
14 Strand and eliminate all of his control over decision-making  
15 of the Debtor. The Debtor recognized early on in this case  
16 that Mr. Dondero's continuing role with the Debtor in a  
17 position of authority made the Committee extremely uneasy.  
18 Accordingly, the term sheet provides for him removing himself  
19 as an officer and director of Strand and that he would no  
20 longer be in a position of control at the Debtor.

21 However, since the filing of the motion, over the last  
22 several days, concerns have been raised about whether removing  
23 Mr. Dondero from the business entirely would have unintended  
24 consequences. I believe I may have mentioned at prior  
25 hearings that, because of his involvement as a portfolio

1 manager under various contracts with third parties, that there  
2 could be adverse economic consequences to the Debtor if he  
3 didn't stay in some role.

4 As a result of discussions over the last 24 hours, the  
5 Committee has agreed and the Debtor agreed to modify the term  
6 sheet to allow the new board to decide whether to retain Mr.  
7 Dondero in his capacity as a portfolio manager, provided,  
8 however, that he will not receive any compensation and he will  
9 agree to resign if requested by the board.

10 In any event, he will have no decision-making control at  
11 all and he will report to the independent board.

12 The corporate governance documents that create the new  
13 independent board of Strand also provide that Mr. Dondero, as  
14 the owner of the equity in Strand, may not replace the board  
15 without the Committee consent or court order.

16 The third major aspect of the term sheet, Your Honor, was  
17 the agreement on operating protocols, and it really relates to  
18 the ground rules for the Debtor's operations going forward and  
19 when notice to the Committee is required of certain  
20 transactions that would otherwise be in the ordinary course of  
21 business.

22 Importantly, Your Honor, we are not trying to modify the  
23 Bankruptcy Code in any way. Any transactions out of the  
24 ordinary course of business would still be subject to Your  
25 Honor's approval.

1           However, in this case, as we indicated in the initial  
2 motion we filed when the case was in Delaware, whether or not  
3 something is ordinary is not straightforward in a case such as  
4 the Debtor's, given the nature of the Debtor's operations. So  
5 we thought it was important to establish ground rules up  
6 front, and establishing those ground rules was one of the  
7 things we did initially in the case. We had opposition from  
8 the Committee, and we've worked through the opposition and  
9 ultimately arrived at the operating protocols that are  
10 attached to the term sheet.

11           They have been slightly modified in nonmaterial ways in  
12 the documents I handed up to Your Honor.

13           They were subject to substantial negotiations between the  
14 Debtor and the Committee, and we also expect them to be the  
15 subject of future discussions with the Committee and the  
16 independent board after the independent board takes -- takes  
17 place. Takes over.

18           Two parties in interest, Your Honor, Jefferies and a group  
19 of Issuers, the CLOs, have filed comments to the term sheet,  
20 which I'll describe in a few moments.

21           THE COURT: Okay.

22           MR. POMERANTZ: The next aspect, Your Honor, of the  
23 term sheet was the provision of standing to the Creditors'  
24 Committee to pursue certain insider claims.

25           During the negotiations, the Committee requested immediate

1 standing to investigate and potentially prosecute claims  
2 against insiders to the extent those insiders were not  
3 employed by the Debtor. Granting standing at this stage of  
4 the case was a difficult give by the Debtor. However, the  
5 Committee impressed upon the Debtor the importance of them  
6 being able to control the filing of any actions against the  
7 insiders, and the Debtor decided to accede to the Committee's  
8 request.

9 It still remains the Debtor's hope that, with the creation  
10 of the independent board, that the Debtor, the Committee, and  
11 any insiders who might be subject to any such claims will be  
12 able to come together and negotiate a consensual resolution of  
13 this case. While all parties, I'm sure, can and know how to  
14 litigate, hopefully they will agree that a negotiated outcome  
15 is better than a litigated outcome.

16 The next aspect of the term sheet, Your Honor, was the  
17 document preservation protocols, and it provides for certain  
18 procedures to be put in place to address the Committee's  
19 concerns about document preservation. They are contained in  
20 an exhibit to the term sheet. Again, slight nonmaterial  
21 modifications were made in what I handed up to Your Honor.  
22 And essentially they provide also for the Committee's access  
23 to privileged documents to aid in their investigation and  
24 prosecution of claims to which they are granted standing, and  
25 also sets forth a procedure to be followed to address concerns

1 if the information is subject to shared privileges by several  
2 entities.

3 As I mentioned, Your Honor, three parties have filed  
4 responses to the motion. The first is Jefferies. Jefferies  
5 is a secured creditor of the Debtor with respect to its margin  
6 account held at Jefferies, and also has a similar account held  
7 by a non-debtor affiliate. They have asked for clarification  
8 that, one, nothing in the protocols or the motion affects its  
9 rights under the underlying agreements or the safe harbor  
10 provisions of the Bankruptcy Code entitling them to enforce  
11 their remedies; and two, that the Debtors will not trade in  
12 the prime account without Jefferies' consent, and if that  
13 consent is sought and not obtained, only subject to court  
14 order.

15 The Debtor has agreed to include language in the order to  
16 address Jefferies' concern, and at the conclusion of my  
17 presentation I'll submit to Your Honor an order and a redline  
18 containing that language.

19 THE COURT: Okay.

20 MR. POMERANTZ: The second objection -- or not  
21 objection, Your Honor -- the second statement was filed by a  
22 group of Issuers of CLO obligations.

23 THE COURT: Uh-huh.

24 MR. POMERANTZ: And they were concerned that certain  
25 aspects of the operating protocols which require notice to the



1 Committee prior to the Debtor being able to take certain  
2 actions could conflict with the provisions of the underlying  
3 agreements which might require the Debtor to take action on a  
4 more expedited basis.

5 Neither the Issuers or the Debtor are aware of any  
6 potential transactions that will arise prior to the next  
7 hearing before Your Honor on January 21st. We understand --  
8 we were not party to these discussions between the Committee  
9 and the Issuers yesterday, but we understand the way it's been  
10 resolved is that the Issuers will withdraw their objection as  
11 it relates to going forward today, subject to being able to  
12 come back to the Court on the 21st and revisit the issue if  
13 additional changes are not made acceptable to them to resolve  
14 their issues and concerns.

15 THE COURT: Okay.

16 MR. POMERANTZ: But I think all parties acknowledge  
17 that over the next 12 days this is a theoretical issue rather  
18 than a practical issue.

19 THE COURT: Okay.

20 MR. POMERANTZ: This brings us, Your Honor, to the  
21 United States Trustee's opposition, which is really the only  
22 true objection to the motion that has been filed. No creditor  
23 has filed an objection, no investor has filed an objection,  
24 and no governmental agency -- which the U.S. Trustee in its  
25 objection purports to be pursuing their interests -- has filed

1 an objection, either.

2 As Your Honor probably recalls, at the December 19th  
3 hearing the Trustee indicated its intent to oppose any  
4 agreement between the Debtor and the Committee that would  
5 involve corporate governance and to file its own motion for  
6 the appointment of the trustee. That motion is currently  
7 scheduled for hearing on January 21st. We had asked the U.S.  
8 Trustee to reserve judgment on the Committee's and Debtor's  
9 agreement until after we had come to an agreement and after we  
10 had presented it to the Trustee, in hopes that it would  
11 address their concerns. However, as the Court told us -- as  
12 the U.S. Trustee told us and Your Honor at the December 19th  
13 hearing, there was nothing short of appointment of a trustee  
14 that would satisfy the Trustee.

15 The comments really didn't make sense to us, and I believe  
16 it perplexed Your Honor, but here we are.

17 At its core, Your Honor, the U.S. Trustee's objection is  
18 really a request that the Court substitute its business  
19 judgment for that of the Debtor and the Committee, the  
20 Committee who represents the substantial majority of all  
21 claims in this case, when both of them have decided that  
22 agreeing to certain changes in corporate governance, among  
23 other things, is preferable to the uncertain, costly, and  
24 time-consuming litigation over a trustee, and also the  
25 uncertainty, even if a trustee was appointed, on how the case

1 would be administered.

2 To the contrary, under the corporate governance proposal,  
3 we have three highly-qualified individuals who are poised to  
4 take over management of the Debtor, and each bring with them  
5 various skills that one trustee would not have.

6 The Trustee has filed its motion for appointment of a  
7 trustee, and I'm sure on the 21st will argue that the Code  
8 requires it. However, that's not the issue before Your Honor  
9 today. It's not whether a trustee is appropriate. It's  
10 whether the motion and the term sheet is a sound exercise of  
11 the Debtor's business judgment under Section 363, and,  
12 importantly, a reasonable compromise of the pending disputes  
13 between the Debtor and the Committee.

14 The Trustee's objection raises three general points, none  
15 of which have any merit. First, the Trustee argues that there  
16 is a lack of disclosure of significant matters. The first  
17 aspect that the Trustee raises to, or points to, is the  
18 absence of identification of the third board member and the  
19 absence of disclosure of the compensation that the board  
20 members will receive, which will be backstopped by the Debtor.

21 As I described before, Your Honor, the identity of the  
22 third member of the board was a fluid process which was only  
23 resolved earlier this week, and the Debtor did not believe  
24 that it was appropriate to reach agreement on director  
25 compensation until all board members could provide input.

1 Last night, we filed a reply to the Trustee's objection in  
2 which we disclosed the identity of the third board member, and  
3 we'll also disclose the proposed compensation to be provided  
4 to them, which essentially is as follows. Each member of the  
5 board will receive \$60,000 a month for the first three months  
6 of the case, \$50,000 a month for the next three months of the  
7 case, and the presumption thereafter would be \$30,000 a month.  
8 However, people recognize that this case will look a lot  
9 differently six months from now, and while the presumption is  
10 \$30,000, the Debtor, the independent board members, and the  
11 Committee will sit down, see how the case looks, and decide  
12 whether any modifications are appropriate.

13 The amount of compensation, which at first blush may seem  
14 significant, really reflects the significant amount of work  
15 that the Debtor, the Committee, and the independent directors  
16 anticipate will be required from them not only to get up to  
17 speed about the case, but to effectively manage this complex  
18 Debtor's business operations. The directors have heard from  
19 the Debtor and the Committee of all the issues, of all the  
20 concerns, and this is not an enviable task that they are  
21 undertaking. The compensation they are being provided thus  
22 far we believe is appropriate under the circumstances and  
23 commensurate with the work that they are going to be expected  
24 to complete.

25 If they are successful and they are able to achieve a

1 consensual restructuring here, the million and a half or so  
2 that will be spent on them will be best million and a half  
3 dollars I think spent in this case.

4 Your Honor, we also have updated corporate governance  
5 documents which --

6 (Pause.)

7 MR. POMERANTZ: Your Honor, may I approach with the  
8 updated corporate governance documents?

9 THE COURT: You may. Okay.

10 MR. POMERANTZ: As I will discuss in a moment, Your  
11 Honor, there is really no need for the Court to approve the  
12 corporate governance documents, as they have been executed by  
13 Strand, which is not a debtor before this Court. However,  
14 there are a couple of matters in those documents that I want  
15 to bring to the Court's attention that do impact on the  
16 Debtor.

17 THE COURT: Okay.

18 MR. POMERANTZ: First, as is typical for board  
19 members, Strand has agreed to indemnify the independent  
20 directors to the full extent permitted by law. The  
21 independent directors have requested that the Debtors backstop  
22 Strand's agreement, and the Debtor and the Committee agree,  
23 and the documents so provide.

24 Strand has also committed to obtain directors and officers  
25 coverage for the independent directors. It has been located,

1 it's in the process of being finalized and bound, and the  
2 Debtor will pay the cost of that coverage.

3 The independent directors have also asked for language in  
4 the order approving the settlement that requires a party  
5 seeking to assert a claim against the independent directors  
6 relating to their role as an independent director to  
7 demonstrate to this Court that a claim is colorable before  
8 filing the claim and providing the Court with jurisdiction  
9 over any such claim. This is language that's similar in other  
10 similar types of cases.

11 THE COURT: Uh-huh.

12 MR. POMERANTZ: That will be reflected in the order.

13 Next, the Trustee objects to the failure of the Debtor to  
14 identify who the potential chief executive officer of the  
15 Debtor will be. And essentially, she's arguing that you have  
16 to identify that CEO now; it has to be subject to court  
17 approval. However, there's no requirement that any company  
18 retain a CEO. It's not a corporate law requirement. And the  
19 fact that the board reserves the right to retain a CEO in the  
20 future is consistent with corporate law and is not a basis to  
21 deny the motion. And in any event, normally, the retention of  
22 a CEO is not a subject that is brought to the Court's  
23 attention for Court approval.

24 So the lack of any clarity over the identity of the CEO is  
25 a reflection of the fact that this independent board does not

1 know if a CEO is required. They will come in, they are going  
2 to interview all the employees, they're going to sit down with  
3 the CRO, they're going to sit down with counsel, they're going  
4 to sit down with the Committee, and ultimately they will  
5 decide if a CEO is to be retained. And if a CEO is to be  
6 retained, they will go through the process of identifying who  
7 that CEO is. But again, it's not a reason to deny the motion.

8 The Trustee has also argued that because the Committee is  
9 not granted standing to pursue claims against current  
10 employees, as opposed to former employees, that there might be  
11 some statute of limitations concerns with respect to claims  
12 against those employees. The argument doesn't really make  
13 sense to us. In the standard case, the Debtor retains causes  
14 of action. And the Committee can investigate causes of  
15 action. And at some point during the case, a Committee could  
16 come in and could demand that the Debtor prosecute them, and  
17 if the Debtor unreasonably refuses, could seek standing before  
18 the Court.

19 In this case, the Debtors agreed up front that the  
20 Committee has the standing to prosecute certain claims against  
21 insiders that are not employees of the Debtor, which obviates  
22 the need for standing. So we've gone one step more. But the  
23 Trustee is arguing that that leaves a void for the claims that  
24 are not subject to the agreement on standing.

25 However, the term sheet provides that the board is going



1 to make determinations on what employees should remain, what  
2 employees should not remain. To the extent the board  
3 terminates any employees and there are claims against them,  
4 then basically the Committee will have the ability to bring  
5 those claims.

6 To the extent that those people aren't terminated, we have  
7 no doubt that the Committee, in the course of its  
8 investigation, will determine whether claims should be brought  
9 against those people, and at some point in time may ask the  
10 Debtor to prosecute those claims or ultimately seek standing.

11 In any event, these things are not being swept under the  
12 rug. There's no real legitimate concern that there's any  
13 statute of limitations issue that will prevent those claims  
14 from being prosecuted.

15 I am very much aware and have no doubt that the Committee  
16 is going to be laser-focused on claims, and any concern that  
17 statute of limitations is going to lapse I think is not well-  
18 taken.

19 The Trustee next argues that the Court does not have the  
20 jurisdiction to implement the corporate governance matters,  
21 and for that reason the motion should be denied. They -- she  
22 argues that because Strand is not a debtor, that the Court has  
23 no authority to appoint --

24 MS. LAMBERT: Your Honor, I object. The United  
25 States Trustee is a he. I am not the United States Trustee,

1 and the attacks *ad hominem* are inappropriate.

2 THE COURT: All right. Well, clarification, the U.S.  
3 Trustee is the guy in Washington. But anyway, you may  
4 proceed.

5 MR. POMERANTZ: I apologize to Ms. Lambert.

6 MS. LAMBERT: Actually, he's downstairs right now.  
7 Bill Neary.

8 MR. POMERANTZ: I apologize to --

9 THE COURT: Oh, well, I thought you meant the big guy  
10 in Washington. But anyway, you may proceed.

11 MR. POMERANTZ: I apologize to Ms. Lambert and no  
12 offense was meant.

13 THE COURT: Okay.

14 MR. POMERANTZ: So, the U.S. Trustee argues that  
15 because Strand is not a debtor that the Court has no authority  
16 to appointment the independent directors and limit Mr.  
17 Dondero's right to remove the independent directors. The  
18 Debtor is not really seeking authority to appoint -- to have  
19 court authority for the appointment of the directors at  
20 Strand. Again, as I mentioned before, that authority exists  
21 outside of bankruptcy. Strand is not a debtor. Strand could  
22 appoint anyone it wants to carry out its responsibility as the  
23 general partner of the Debtor, and it's exercising its  
24 corporate authority to do so by installing a board at Strand.

25 Nor is the Debtor seeking court authority for Strand to

1 enter into the corporate governance documents. Other than the  
2 couple of items I mentioned before, Your Honor, Strand can  
3 enter into these documents without authority from this Court.  
4 The only court authority that was required: Debtor to  
5 backstop the indemnification obligations, Debtor to pay  
6 compensation to the board members, and Debtor to pay for the  
7 D&O policy.

8 With respect to the Court's right to limit Mr. Dondero's  
9 ability to terminate the independent directors, the term sheet  
10 contemplates the Court approving a stipulation which limits  
11 Mr. Dondero's ability to terminate the independent directors,  
12 and if he does in fact seek to terminate the appointment of  
13 the independent directors, he would be in violation of court  
14 order. But even more importantly, Your Honor, if he decided  
15 to terminate the independent directors without the Committee's  
16 consent and without the Debtor's consent, I wouldn't imagine  
17 it would take anyone very long to come back before Your Honor  
18 and ask Your Honor to very quickly appoint a trustee.

19 Accordingly, Your Honor, I think the argument of lack of  
20 jurisdiction over Strand is a red herring and should be  
21 denied.

22 Lastly, Your Honor, the Trustee makes a curious argument  
23 that a trustee is needed to protect all investors and  
24 governmental authorities. The Trustee argues that this case  
25 demands transparency which can only be accomplished by a

1 Chapter 11 trustee.

2 One thing I think the Debtor and the Committee and the  
3 U.S. Trustee will agree on, this case does demand  
4 transparency. And we believe we've installed a corporate  
5 governance structure, an operating protocol structure, a  
6 document preservation structure, that does just that, provides  
7 transparency that this Debtor has not been subject to and  
8 which is quite different from the case that was before Your  
9 Honor before.

10 So we believe that what the Debtor and the Committee have  
11 done is not only in the interests of the Debtor, the  
12 creditors, but investors and all governmental entities.

13 And no investor or governmental entity has had any  
14 concerns or any problems with what is being done. They  
15 haven't filed any objection. The U.S. Trustee apparently is  
16 proceeding by proxy asserting those interests.

17 Second, nothing in the term sheet or any of the documents  
18 limits the rights of investors or of governmental entities to  
19 seek a trustee, to seek documents, or to do anything they  
20 would -- that they would be entitled to do under the  
21 Bankruptcy Code.

22 In any event, Your Honor, the fact that the Trustee  
23 believes that a trustee is more appropriate, again, is an  
24 argument that they can make at the January 21st hearing. It's  
25 not a basis for denial of this motion.

1           In conclusion, Your Honor, the only economic stakeholders  
2           in this case believe that proceeding with the transactions  
3           contemplated by the term sheet is in the best interest of the  
4           estate, will maximize their ability to achieve a consensual  
5           restructuring, and move this case through the system as  
6           quickly and efficiently as possible. The term sheet is a  
7           valid exercise of the Debtor's business judgment under 363 and  
8           an appropriate compromise of controversy, and the Trustee's  
9           objections are really nothing more than a rehash of its  
10          request for an appointment of a trustee.

11          For all these reasons, Your Honor, we request that the  
12          Court overrule the U.S. Trustee's objection and approve the  
13          motion.

14                THE COURT: All right. Well, before I hear from our  
15                objectors, is there any friendly commentary? Mr. Clemente, I  
16                figured you might want to address this.

17                MR. CLEMENTE: I do, Your Honor. And good morning.

18                THE COURT: Good morning.

19                OPENING STATEMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF  
20                UNSECURED CREDITORS

21                MR. CLEMENTE: For the record, Matthew Clemente from  
22                Sidley Austin on behalf of the Official committee of Unsecured  
23                Creditors. I do have some comments that I would like to make,  
24                Your Honor, some, so please bear with me. I will try and be  
25                brief.

1 THE COURT: Okay.

2 MR. CLEMENTE: I think as late as 1:00 o'clock in the  
3 morning I wasn't sure that I would be in front of you with  
4 this settlement fully in place in a manner that was  
5 satisfactory to my Committee. As I mentioned to you in my  
6 prior appearances in front of you, every provision was  
7 important to the Committee, and they all work together. As  
8 Your Honor can imagine, there was a lot of negotiation that  
9 took place, including late in the day and early morning, to  
10 come to that conclusion.

11 Some comments on our perspective as a committee, Your  
12 Honor. As an initial matter, we were absolutely not okay with  
13 the governance structure that was in place when the petition  
14 was filed. As we detailed in our objections to the CRO motion  
15 and the protocol motion back when the case was in Delaware,  
16 the Committee has very real and identifiable concerns about  
17 the Debtor's ability to dispatch its fiduciary duty. And the  
18 Committee very seriously contemplated moving for a Chapter 11  
19 trustee daily. That conversation is something that the  
20 Committee continues to -- continued to engage in, Your Honor.  
21 So it's something that they considered very, very carefully.

22 That was the lens through which the Committee was  
23 approaching negotiations over the settlement agreement and the  
24 independent director structure. That's how they viewed it.  
25 That's the backdrop against which they came to it.

1           The Committee had two primary goals that it had sought to  
2           achieve with the settlement agreement. The first was to  
3           ensure that Mr. Dondero does not remain in a position of  
4           management authority or control in any fashion with the  
5           Debtor. Goal number two was to ensure that the value of the  
6           Debtor's estate is preserved and maximized. Those two goals  
7           needed to work together.

8           The Committee believes that the carefully-crafted  
9           settlement agreement achieves these objectives in a manner  
10          that is more beneficial to the estate than a potential Chapter  
11          11 trustee and a related fight over its appointment at this  
12          time.

13          The lynchpin of the settlement, Your Honor, is the  
14          appointment of the three independent directors. And as Mr.  
15          Pomerantz outlined for you, that was the subject of intense  
16          discussion, negotiation, debate among the Committee and with  
17          the Debtor. But we believe that Mr. Seery, Mr. Dubel, and  
18          Judge Nelms are fully independent, highly qualified, and bring  
19          relevant and complementary skillsets to this board. Mr.  
20          Pomerantz referred to that, but we believe that the three  
21          directors all bring unique talents and attributes that will  
22          allow them to function effectively as a board and provide the  
23          appropriate oversight and direction that we believe is  
24          necessary here.

25          However, regardless of how independent or highly skilled



1 they may be, they would be of no use if they weren't bestowed  
2 with the appropriate power. So that was another point that  
3 was very important to the Committee, and we believe that the  
4 settlement does this. The settlement makes clear that the  
5 independent directors are granted exclusive control over the  
6 Debtor, including over all employees. That's absolutely  
7 critical to the Committee.

8 The settlement also provides that the CRO and the Debtor's  
9 professionals shall report and serve at the direction of the  
10 independent directors. That is also very important.

11 And let me be clear, Your Honor, because I think you may  
12 have raised this at a prior hearing: This is not a board that  
13 we expect to work at 50,000 feet, as demonstrated by the  
14 compensation structure that Mr. Pomerantz outlined for you.  
15 This will be a board that's hands-on, members of which will be  
16 on the ground, at the Debtor, with a strong presence and a  
17 clear message of who is in charge. That is critical for this  
18 Committee.

19 Additionally, as Mr. Pomerantz mentioned, the new board,  
20 in consultation with the Committee, is empowered to determine  
21 whether a CEO should be retained. It's possible that one of  
22 the independent directors could be that CEO, Your Honor. But  
23 we wanted to make clear that that was an important part of the  
24 structure, should the board determine that that was the way it  
25 wanted to go.

1           So, in sum, Your Honor, we believe that the independent  
2 board has the clear authority and the skillset that's  
3 necessary to take control and will be actively and  
4 aggressively doing so.

5           But let me be clear, rest assured, Your Honor, this is not  
6 going to be a board that answers to the Committee in that  
7 sense. I think that we will all be moving together  
8 directionally, but it's very possible that I will be in front  
9 of Your Honor arguing against a decision that this independent  
10 board made. So I want to assure Your Honor that although the  
11 Committee was very active and in fact picked Mr. Seery and Mr.  
12 Dubel, and then Mr. Pomerantz detailed how the third director  
13 was picked, we understand who their duty -- what their duty is  
14 and we also understand that they're not a rubberstamp for the  
15 Committee, Your Honor. And so I wanted to make that point to  
16 you to assure Your Honor that that's not the structure that's  
17 being set up here, nor are they the type of individuals that  
18 would allow that to happen.

19           Additionally, Your Honor, the settlement grants the  
20 Committee standing to pursue estate causes of action against  
21 the related parties. That was very important to us, Your  
22 Honor.

23           And in addition to that, the settlement provides the  
24 Committee access to privileged documents and sets forth a  
25 discovery protocol that will assist the Committee in its

1 investigation.

2 The Committee strongly believes that Mr. Dondero's  
3 repeated past behavior, that there are many questionable  
4 transactions that will need to be thoroughly investigated and  
5 pursued. And so having those causes of action with the  
6 economic party in interest related to those causes of action,  
7 the Committee and its constituencies, we thought was very  
8 important and very critical.

9 Granting standing, Your Honor, as I mentioned, avoids any  
10 issues regarding who will be controlling those claims.

11 I'll touch on this in a moment, but Mr. Pomerantz talked  
12 about Mr. Dondero remaining in name as an employee. Let me  
13 assure Your Honor that that is not a backdoor around the  
14 Committee's ability to investigate and immediately pursue  
15 claims against him should that be the course that we choose to  
16 take. So he's not part of that carve-out for current  
17 employees. That's not at all happening. That would never be  
18 something that my Committee would be comfortable with. So I  
19 wanted to make clear to Your Honor that that's not something  
20 that's happening with sort of this late edition of Mr.  
21 Dondero's continuing on in name as an employee.

22 Your Honor, the settlement also lays out a very detailed  
23 set of operating protocols which we do believe are appropriate  
24 and provides the Committee with transparency, which I've been  
25 expressing to Your Honor we've needed since this case has

1 started.

2 Finally, as we point out in our reply and as would always  
3 be the case, should new facts develop or the situation demand  
4 it, the Committee reserves the right to seek a Chapter 11  
5 trustee, as does any other party in interest, to the extent it  
6 may be appropriate at that time.

7 In short, Your Honor, the Committee very carefully and  
8 diligently weighed the independent director option versus the  
9 Chapter 11 trustee option. The Committee had very clear goals  
10 in mind, as I expressed to you, and determined that those  
11 goals could be achieved in a value-maximizing manner through  
12 the independent director structure.

13 The negotiations were very intense, and it was only after  
14 the Committee determined that each piece of the settlement was  
15 to its satisfaction did it ultimately conclude that the  
16 settlement maximizes value for all stakeholders while at the  
17 same time protecting those stakeholders from exposure to  
18 continuing insider dealing, breaches of duty, and  
19 mismanagement.

20 Therefore, the Committee believes approving the settlement  
21 is in the best interest of the estate, and therefore it  
22 believes it should be approved.

23 I do want to offer a word about Mr. Dondero continuing as  
24 an employee. As Your Honor was aware, the term sheet as  
25 originally filed provided that Mr. Dondero would, among other

1 things, resign as an employee of the Debtor. Mid to late  
2 afternoon yesterday, Mr. Ellington called me and said that the  
3 Debtor was now of the view that Mr. Dondero should remain on  
4 as an employee in that capacity for the benefit of the estate.  
5 The Committee was, very appropriately, very skeptical of this,  
6 as well as the sort of last-minute offer, last-minute, you  
7 know, addition, however you want to view it -- some might  
8 argue retrade -- that Mr. Dondero was to leave the Debtor,  
9 period. That was our view. That was the way that the term  
10 sheet was initially structured. And under no circumstances  
11 was the Committee going to allow Mr. Dondero to have any  
12 control over this Debtor.

13 Your Honor, the Committee doesn't know what, if any, the  
14 consequences are of removing Mr. Dondero as an employee. And  
15 we're not conceding at all that there are any value lost by  
16 removing Mr. Dondero as an employee. Instead, what we're  
17 doing is we're staying true to our structure with the  
18 independent directors and we're empowering them to decide.  
19 And so it's consistent with, you know, our goals of having the  
20 independent director structure in place. And under the  
21 settlement as now constructed, even with this late addition or  
22 adjustment, Mr. Dondero would remain as an employee in name  
23 only, subject in all respects to the direction, oversight, and  
24 removal by the independent board. And importantly, should  
25 they decide to do that, Mr. Dondero shall resign. And he

1 shall receive no compensation.

2 So he will not be in control of this Debtor. The  
3 independent directors are. And he's not going to be empowered  
4 to make decisions on behalf of the Debtor. Instead, we're  
5 empowering our independent directors to make those decisions  
6 and determinations on behalf of the Debtor.

7 I wanted -- I thought it was important that I provide that  
8 perspective to Your Honor, as this is something that came in  
9 at a very, very late hour.

10 Overall, Your Honor, for the reasons I have stated and the  
11 reasons in our reply, the Committee, as a fiduciary of all  
12 creditors in this case, believes that the settlement is in the  
13 best interests of the creditors and should be approved. And  
14 at this time, it's the better alternative than the cost,  
15 delay, and uncertainty resulting from a Chapter 11 trustee  
16 fight and the potential appointment of a Chapter 11 trustee.

17 It is time to put the governance issues behind us, Your  
18 Honor, and to move forward to determine how to maximize value  
19 for the creditors and how to get them paid.

20 Your Honor, just regarding the specific resolutions of  
21 objections that Mr. Pomerantz put on the record, I agree with  
22 how Mr. Pomerantz characterized those, and the Committee is  
23 supportive of those resolutions as well.

24 Those are all my remarks, Your Honor, but I am happy to  
25 answer any questions or address any concerns Your Honor may

1 have.

2 THE COURT: Okay. Two follow-up questions. First, I  
3 know I asked you this at a previous hearing and you told me,  
4 but your Committee, as I recall, is very well constituted.  
5 Just remind me of the members.

6 MR. CLEMENTE: Yes.

7 THE COURT: You have a representative from the  
8 Redeemer Committee, --

9 MR. CLEMENTE: Yes, Your Honor.

10 THE COURT: -- which is a \$140 million or so  
11 arbitration award?

12 MR. CLEMENTE: Yes, Your Honor.

13 THE COURT: Okay. And who else is on the Committee?  
14 Is an Acis representative?

15 MR. CLEMENTE: Acis is on the Committee, Your Honor.

16 THE COURT: Uh-huh.

17 MR. CLEMENTE: Meta-e Discovery, who is a trade  
18 vendor of the Debtor, is on the Committee. And UBS  
19 Securities, who is also --

20 THE COURT: Okay.

21 MR. CLEMENTE: -- a litigation claimant, is on the  
22 Committee.

23 It was the U.S. Trustee in Delaware's parting gift to me  
24 to name a four-member committee, Your Honor.

25 (Laughter.)



1 THE COURT: Okay. Makes it awkward at times. And  
2 then back to the Dondero subject.

3 MR. CLEMENTE: Yes, Your Honor.

4 THE COURT: I mean, again, both Mr. Pomerantz and you  
5 clarified that the proposal now is the new board will decide  
6 if he stays on, Mr. Pomerantz said as a portfolio manager.

7 MR. CLEMENTE: That is correct, Your Honor.

8 THE COURT: Am I -- I mean, I'm hearing that  
9 correctly?

10 MR. CLEMENTE: That is correct, Your Honor.

11 THE COURT: So, right now, whatever officer positions  
12 he has, he's technically not resigning? Or --

13 MR. CLEMENTE: He is resigning as an officer of the  
14 company, Your Honor.

15 THE COURT: Okay. He's resigning? So the board will  
16 just decide, is he going to be a portfolio manager or some --  
17 whatever the employee title is?

18 MR. CLEMENTE: Or they could decide that he's not  
19 necessary.

20 THE COURT: Or not necessary? In any event, no  
21 compensation?

22 MR. CLEMENTE: That is correct, Your Honor.

23 THE COURT: Okay.

24 MR. CLEMENTE: And as you can see, the term sheet  
25 provides that Mr. Dondero shall not cause any related entity

1 to terminate any agreements with the Debtor as well. That was  
2 language that was added last night as well.

3 THE COURT: All right. So they're going to make the  
4 decision, does he help preserve value by staying in some  
5 capacity or not?

6 MR. CLEMENTE: That is correct, Your Honor.

7 THE COURT: Okay.

8 MR. CLEMENTE: That, cutting through it, that is the  
9 way that ultimately the Committee views it.

10 THE COURT: Okay.

11 MR. CLEMENTE: And if there's an opportunity -- and  
12 I'm not conceding that there is. I'm not conceding that he  
13 preserves any value.

14 THE COURT: Uh-huh.

15 MR. CLEMENTE: But we wanted to give the option to  
16 our independent directors to make that determination. Because  
17 if there's an opportunity to preserve value, that's what we're  
18 trying to achieve.

19 THE COURT: Okay. And I don't even know if you've  
20 thought through this. Would there be some sort of notice  
21 filed on record in the case if --

22 MR. CLEMENTE: If --

23 THE COURT: -- if the decision is made to --

24 MR. CLEMENTE: To -- to --

25 THE COURT: -- hire him or keep him as a portfolio

1 manager?

2 MR. CLEMENTE: So, I think the default under the term  
3 sheet, as revised, is he stays in that capacity in terms of  
4 name. The independent directors will -- they're subject to  
5 his control and direction, and they could decide to remove  
6 him.

7 THE COURT: Uh-huh.

8 MR. CLEMENTE: Perhaps if Your Honor --

9 THE COURT: Okay.

10 MR. CLEMENTE: We could provide notice if they make  
11 the determination to remove him, but I think the default is  
12 that, you know, he's in that -- he's remaining as that  
13 employee name currently. So that's the current default.

14 THE COURT: Okay. All right. Thank you.

15 MR. CLEMENTE: Thank you very much, Your Honor.

16 THE COURT: Well, Ms. Patel, you're getting up so  
17 I'll hear -- I don't know who all has been in the loop over  
18 this overnight development.

19 OPENING STATEMENT ON BEHALF OF ACIS CAPITAL MANAGEMENT

20 MS. PATEL: Your Honor, Acis has been in the loop as  
21 a member of the Committee. And I will be very brief with  
22 respect to Acis's individual comments. And I just want to be  
23 clear: Obviously, I'm here as counsel for Acis, and so this  
24 is Acis's individual position. Mr. Clemente aptly and very  
25 ably handled the Committee's overall position with respect to

1 this.

2 But Your Honor, I just want to, on behalf of Acis, make  
3 sure that, because of these developments, that's really -- I  
4 really had hoped to have zero role today, but I want to make  
5 sure that we're -- Acis is on record with respect to our  
6 position. And obviously, given Your Honor's knowledge and  
7 oversight of the long history of Acis's bankruptcy case and  
8 seeing some of the events that transpired there, I'm sure that  
9 this will all, against that backdrop, make an awful lot of  
10 sense.

11 But, you know, it's this continued role for Mr. Dondero  
12 that is of concern. You know, this issue even being raised  
13 within like the last 48 hours by Mr. Ellington, the timing of  
14 it just creates an issue. I mean, did this -- how could this  
15 possibly have come out of left field when this is such a huge  
16 part of what the Debtor does in its ordinary course of  
17 business, is serve as a portfolio manager, and these are  
18 contracts that have been negotiated, generally speaking,  
19 internally by Highland. So the fact that if Mr. Dondero were  
20 to exit the structure and there would be some potential  
21 ramifications to that, I've got to wonder how much of a  
22 surprise could that really have been to Highland folks.

23 But I just wanted to highlight, in connection with the  
24 term sheet -- this is the preliminary term sheet that was  
25 handed up Your Honor, and I believe Your Honor has a redline

1 version of it as well --

2 THE COURT: Uh-huh.

3 MS. PATEL: -- on Page 2, with respect to the role of  
4 Mr. James Dondero, there's various provisions in there. And I  
5 guess I would be remiss, Your Honor, if I didn't say, at least  
6 out of the gate, Acis obviously supports the implementation of  
7 this independent board of directors. We believe all the  
8 candidates are very capable and are -- we put our reliance  
9 upon them.

10 Obviously, we don't concede any issues. We'll see what  
11 we're going to do. But certainly, for the time being, we do  
12 support the entry of this agreement of the settlement -- or,  
13 I'm sorry, approval of the settlement agreement by the Court  
14 that lets the independent board be put into place.

15 But what I'll focus the Court on, on Page 2 under the role  
16 of Mr. James Dondero, it goes through various provisions as to  
17 what he'll resign to -- positions he'll resign from and that  
18 he will remain as an employee of the Debtor, including  
19 maintaining his title as portfolio manager for all funds and  
20 investment vehicles for which he currently holds that title.  
21 And then it goes on to provide as to who he'll report to and  
22 how he will be governed, which includes by the independent  
23 board, he will receive no compensation, and that he will be  
24 subject to at all times the supervision, direction, and  
25 authority of the independent directors.

1 Again, we have faith that the independent directors will  
2 oversee this and will govern his role accordingly. However,  
3 given Acis's history with how transactions have transpired at  
4 Highland, we remain highly cautious with respect to what  
5 happens next.

6 And to that end, Your Honor, the very last sentence there  
7 on Page 2, "Mr. Dondero shall not cause any related entity to  
8 terminate any agreements with the Debtor," is a key provision  
9 of this that keeps Acis, as a Committee member, on board with  
10 this agreement. I wanted to highlight that and note that, in  
11 the last less than 48 hours, in the last 12 hours, or maybe a  
12 little bit more than that, call it 18 to be safe, that's where  
13 -- that's a provision that's been -- that's where we've ended  
14 up. It's all of these issues have been going at lightning  
15 speed, but I did want to just, for the record and so everybody  
16 is clear, that is an important piece of this agreement to --  
17 for Acis.

18 And as Your Honor knows, this Debtor, Highland, is wont to  
19 try to terminate agreements and to try -- in an attempt to try  
20 and transfer valuable contracts away and valuable revenue  
21 stream away from an entity to an alternate entity. And that's  
22 really the heart of our concern, Your Honor.

23 So, with that, I just wanted to be clear and be on record  
24 as to Acis's position. Thank you.

25 THE COURT: Thank you. All right.

1 MR. POMERANTZ: Your Honor, if I briefly may respond  
2 to the issues with Mr. Dondero while they are fresh in Your  
3 Honor's mind?

4 THE COURT: Okay. Okay.

5 MR. POMERANTZ: Your Honor, look, we appreciate the  
6 timing of this coming to the attention of the Committee as  
7 being less than optimal. As Your Honor can appreciate, this  
8 case that's been filed three months ago, a lot of people are  
9 looking very carefully at what's happening to the Debtor.  
10 Investors are looking. There was a transfer of venue. There  
11 have been a lot of reports about potential trustee motions.  
12 And we believe a lot of parties are waiting to see the outcome  
13 of this hearing and the trustee hearing to determine whether  
14 they will determine to continue to do business with the  
15 Debtor.

16 It's not only an issue of contractual rights. It's also  
17 an issue of whether investors feel comfortable on who is  
18 managing, who is managing their investments.

19 This issue of Mr. Dondero's continuing role has been  
20 something that at the Debtor we've continued to grapple with  
21 over the last several weeks. It's always been our thought  
22 that we should do nothing that would unduly harm the company  
23 from an economic standpoint. I think the Committee shares  
24 that. That if it's determined by an independent board -- and  
25 don't take current Debtor professionals, don't take current

1 Debtor employees' word for it -- but if they determine that  
2 there's an economic benefit by keeping him on to preserve  
3 material revenue stream, they should be able to make that  
4 determination. I think that's really at the core here. And I  
5 think the Committee got ultimately comfortable with it because  
6 it will be an independent board, the majority of the members  
7 identified and chosen by them and accepted by the Debtor.

8 So, again, we apologize to the parties and the Court for  
9 bringing this on late. It wasn't my intent to come here and  
10 present modified versions of the term sheet that hadn't been  
11 filed. But that's where we are, and that's why it has come  
12 up, and that's why it's an extremely important issue, because  
13 preserving whatever revenue we can for the Debtor is  
14 important.

15 Now, at the end of the day, the board may either decide  
16 that he doesn't preserve the revenue, or the negatives from  
17 keeping him involved with the company outweigh any benefits.  
18 And that's a decision they will have to make, and it'll be  
19 their province to make. So I just wanted to give Your Honor  
20 that perspective.

21 THE COURT: Okay.

22 MR. DAUGHERTY: Your Honor, may I approach?

23 THE COURT: Mr. Daugherty? You may.

24 OPENING STATEMENT ON BEHALF OF PATRICK DAUGHERTY

25 MR. DAUGHERTY: I apologize. I was not planning to



1 address the Court at all today. I would have had my attorney  
2 here for it. But I just ask a little bit of indulgence to  
3 represent myself *pro se* for this issue.

4 This is the first I've heard that Mr. Dondero would stay  
5 with the company. I think it's an awful idea. There's a  
6 litany of reasons for that.

7 By the way, I'm completely in support of this -- of this  
8 board that's been chosen. I have every confidence that  
9 they'll be able to make good decisions eventually. But  
10 they're stepping into this thing new. Obviously, I've been  
11 through this in your court with *Acis* and other matters, and I  
12 have deep, deep concerns about Mr. Dondero continuing in that  
13 role, simply because of the influence it has on the rest of  
14 the organization and the message that it sends, both  
15 internally and externally, of where the company goes from  
16 here.

17 So I just wanted to let you know my thoughts. I wasn't  
18 planning to make them. I haven't filed anything. But that's  
19 where I stand.

20 THE COURT: All right. Thank you, Mr. Daugherty.

21 All right. Before we hear from the U.S. Trustee, who I  
22 know is going to have a lot to say, let me just circle back  
23 briefly to Jefferies counsel and the CLO Issuers' counsel.  
24 You heard the representations of Mr. Pomerantz earlier about,  
25 well, first, in the case of Jefferies, that the Debtor has

1 agreed to language to address your concerns. Do you want to  
2 weigh in on that and confirm that you're content that you're  
3 going to have language to work out your concerns?

4 OPENING STATEMENT ON BEHALF OF JEFFERIES, LLC

5 MR. MAXCY: Thank you, Your Honor. Patrick Maxcy for  
6 Jefferies.

7 No, I don't have anything additional to add to what Mr.  
8 Pomerantz said. The language that we have worked out will  
9 speak for itself and will be included in the order.

10 THE COURT: All right. Thank you.

11 And counsel for the CLO and CDO Issuers, do you confirm  
12 that you would be in agreement to basically withdraw your  
13 objections for now, but perhaps come back and make argument on  
14 the 21st if you have not worked out language with the  
15 Committee that you think works?

16 OPENING STATEMENT ON BEHALF OF THE ISSUER GROUP

17 MR. BENTLEY: James Bentley from Schulte Roth for the  
18 Issuers, Your Honor.

19 I believe the deal that Mr. Pomerantz and Mr. Clemente  
20 and I have discussed was adjourning our objection to the 21st,  
21 --

22 THE COURT: Okay.

23 MR. BENTLEY: -- rather than withdrawing it.

24 THE COURT: Okay.

25 MR. BENTLEY: We're -- we believe we will be able to

1 come up with language acceptable to the Issuers, but we would  
2 like to reserve the right to come back to the Court on our  
3 limited objection if we cannot, given that our issue is really  
4 -- really only relates to the 25 Issuers we represent.

5 THE COURT: Okay. Thank you very much.

6 All right. Ms. Lambert?

7 OPENING STATEMENT ON BEHALF OF THE UNITED STATES TRUSTEE

8 MS. LAMBERT: May it please the Court. As the Debtor  
9 acknowledges, the motion that they are settling, the issues  
10 that they are settling, are the issues that the U.S. Trustee  
11 has raised in his motion to appoint a Chapter 11 trustee. As  
12 a matter of statutory construction, Section 1104 does not  
13 contemplate settlement of these issues. 1112, in contrast,  
14 has a provision that if the Court finds and determines that  
15 there is cause to convert a case, there are unusual  
16 circumstances and the Court can find a reasonable  
17 justification for the wrongdoing or the error that occurred  
18 that led to cause -- for example, administrative defects in  
19 1112, not filing monthly operating reports -- and that can be  
20 cured. The Court has to make a finding that those -- these  
21 defects can be cured within a reasonable period of time.  
22 Section 1104 contains no analog to his.

23 If the Court finds cause to direct the appointment of a  
24 Chapter 11 trustee, then the Court is supposed to appoint a  
25 Chapter 11 trustee. And *Trailer Ferry* and *AWECO* both stand

1 for the proposition that, on today's day, we're supposed to  
2 have evidence about what the management issues are that led to  
3 this agreement. There's been no evidence. There's been no  
4 allegations in the motion for settlement. And so the U.S.  
5 Trustee is prepared to put that evidence on.

6 And Your Honor, one aspect of this is that the arbitration  
7 agreement has been sealed. And there are people on the phone.  
8 I don't know who's on the phone. The U.S. Trustee has opposed  
9 the sealing of the arbitration -- not arbitration agreement,  
10 the arbitration judgment -- has opposed the sealing of that.  
11 And then they referenced a confidentiality order as the basis  
12 to seal it. The U.S. Trustee also opposed that  
13 confidentiality motion, which was filed subsequently to the  
14 motion to seal.

15 There is no confidentiality order. An interim order was  
16 entered sealing the arbitration award, but -- and the U.S.  
17 Trustee has honored that by redacting all of the pleadings  
18 that we filed relating to that, but it's important today for  
19 the U.S. Trustee to be able to discuss it in argument, and it  
20 is here -- and we have it prepared to be admitted into an  
21 exhibit.

22 So, to proceed with my argument, Your Honor, I need some  
23 clarification about what I can say.

24 THE COURT: You want clarification from me on what  
25 you can say?

1 MS. LAMBERT: Well, I mean, either that or we need to  
2 clear the room.

3 THE COURT: I've read the arbitration award.

4 MS. LAMBERT: Right.

5 THE COURT: It's in my brain.

6 MS. LAMBERT: Right. Okay.

7 THE COURT: Uh-huh.

8 MS. LAMBERT: And so one of the arguments here today  
9 is that the U.S. Trustee is representing the SEC and  
10 representing other Government agencies and things. No.  
11 Obviously, that is not the U.S. Trustee --

12 THE COURT: I didn't hear that.

13 MS. LAMBERT: Okay. The -- one of the positions has  
14 been, in the papers, is, well, that we don't have standing to  
15 raise their issues. And that's true.

16 THE COURT: Okay.

17 MS. LAMBERT: But the problem is that the U.S.  
18 Trustee has been constrained from discussing those issues with  
19 the SEC. The arbitration award is very relevant to the SEC's  
20 oversight. I anticipate the evidence today will be that the  
21 SEC, after the financial crisis of 2008, imposed restrictions  
22 on this Debtor on breach of fiduciary duty issues. I  
23 anticipate that the arbitration findings would be very  
24 relevant to whether those issues are ongoing or not.

25 THE COURT: Okay. Let me weigh in. I view the legal

1 standard that this Court has to weigh today as being: Is the  
2 Debtor proposing something that is reflective of sound  
3 business judgment, reasonable business judgment? And to the  
4 extent this is a compromise of controversies with the  
5 Committee, is this fair and equitable and in the best interest  
6 of the estate?

7 And as Mr. Pomerantz has said, you know, a lot of this  
8 maybe doesn't even need Court approval. But to the extent  
9 there are aspects of this that are appropriate to seek Court  
10 approval on, you know, this is my task. I have to look at  
11 what's presented, and is this reflective of sound business  
12 judgment? Is this fair and equitable? Is it in the best  
13 interest?

14 So, assuming there are tons of bad facts here reflected in  
15 the arbitration award, reflected in other evidence, bad facts  
16 that might justify a trustee, a Chapter 11 trustee, is this  
17 nevertheless, what's proposed today, a reasonable compromise  
18 of, you know, the trustee arguments the Committee could make  
19 or, you know, is this a reasonable framework for going  
20 forward? Okay?

21 So I guess what I'm saying is I'm confused about, you  
22 know, do I need to look at the arbitration award? Do we need  
23 to have evidence of all of that? I can assume that there are  
24 terrible facts out there that might justify a trustee, but I'm  
25 looking at what's proposed. Is this a fair and equitable way

1 to resolve the disputes? Is it sound business judgment?  
2 Frankly, is it a pragmatic solution here to preserve value?  
3 So that's the legal standard I have in my mind here.

4 MS. LAMBERT: Yes, Your Honor.

5 THE COURT: Okay.

6 MS. LAMBERT: The standard is whether it is fair and  
7 equitable to resolve the issues in the Chapter 11 trustee  
8 motion, and it is the U.S. Trustee's position that they are  
9 not resolved by this. And how are they not resolved? Number  
10 one, they're not resolved because the problems that led to the  
11 breach of fiduciary duty issues and findings are more  
12 pervasive, both based on this Court' finding in the *Acis* case  
13 and in the arbitration court's finding in Mr. Dondero. Other  
14 officers are implicated.

15 THE COURT: But how --

16 MS. LAMBERT: Other employees are implicated.

17 THE COURT: Okay. I feel like maybe we're talking at  
18 each other, not getting each other. I've got a proposed  
19 solution here to totally change the playing field, if you  
20 will. Bring in incredibly qualified people to --

21 MS. LAMBERT: Those people --

22 THE COURT: -- to change out the, you know, the  
23 person that you say breached fiduciary duties, the, you know,  
24 mismanagement, whatever bad labels we have here, but bring in  
25 a clean slate.

1 MS. LAMBERT: No, Your Honor, because employees  
2 remain at the Debtor who are problematic. The board that is  
3 appointed owes a fiduciary duty to whom? Strand. Dondero.  
4 He's still the board -- he is the sole stockholder. Yes. In  
5 addition, --

6 THE COURT: And they won't be taking directions from  
7 him.

8 MS. LAMBERT: In addition, --

9 THE COURT: The term sheet is they won't be taking  
10 directions from him.

11 MS. LAMBERT: Your Honor, there is no evidence before  
12 the Court today that Mr. Dondero has entered a stipulation.  
13 This is part of the problem. This continues --

14 THE COURT: Well, if he doesn't, in five minutes the  
15 Committee is going to be filing their trustee motion, right?

16 MS. LAMBERT: Well, then we haven't saved any time or  
17 any money. This is the whole issue. They have to put on  
18 evidence that this is a resolution of issues. We're going to  
19 have the motion to appoint a Chapter 11 trustee either way.

20 THE COURT: All right. Well, we did have the  
21 evidence of Mr. Sharp. Would you like to cross-examine him at  
22 this point?

23 MS. LAMBERT: Your Honor, I would like to put the  
24 U.S. Trustee's exhibits into evidence and then cross-examine  
25 him.



1 THE COURT: All right. Your exhibits?

2 MR. POMERANTZ: Your Honor, we would object to any  
3 exhibits. The Trustee has not filed an exhibit list.

4 MS. LAMBERT: Your Honor, this matter was set on an  
5 expedited basis and the Court does not require exhibit and  
6 witnesses lists when a matter is filed on an expedited basis.  
7 It's impossible, when a response is filed at 5:00 o'clock the  
8 evening before and supplements are made in the morning of the  
9 hearing, for the U.S. Trustee to put on a witness and exhibit  
10 list.

11 MR. POMERANTZ: Your Honor, we were here on the 19th.  
12 We set out a briefing schedule. And maybe it was a couple  
13 days short of normal notice. Ms. Lambert agreed to issue  
14 discovery by a certain date, and she at no point said that  
15 because there was 13 days' notice as opposed to longer period  
16 that she couldn't comply and provide a witness list.

17 We provided with a witness list. We provided an exhibit  
18 list. The Trustee's effort and attempt to now submit exhibits  
19 and rely on maybe there were some changes this morning, that  
20 just doesn't cut it, and that's not fair and that's not due  
21 process.

22 THE COURT: Okay. I sustain the objection. The  
23 exhibits won't be admitted since there was no exhibit list.

24 MS. LAMBERT: Your Honor, I do not have an exhibit  
25 list from them. And they --

1 THE COURT: Well, they haven't offered any.

2 MS. LAMBERT: They put on new exhibits this morning.  
3 The exhibits that the U.S. Trustee has are all things that  
4 they are familiar with.

5 THE COURT: Let me back up. They didn't introduce  
6 any exhibits. They --

7 MS. LAMBERT: But they introduced the declaration,  
8 they introduced the supplements to the agreement that were  
9 drafted this morning, they've introduced the new corporate  
10 resolutions, all of which they handed me this morning.

11 THE COURT: All right. Well, the declaration of Mr.  
12 Sharp, it's two pages long. It is, I don't think, any kind of  
13 surprise information.

14 MS. LAMBERT: Your Honor, --

15 THE COURT: I'll allow you to cross-examine him.

16 MS. LAMBERT: -- the U.S. Trustee's exhibits are no  
17 surprise, either. The *Acis* opinion is no surprise to anybody  
18 in this courtroom.

19 THE COURT: Okay. Well, what are your exhibits?

20 MS. LAMBERT: The --

21 THE COURT: I probably should have asked.

22 MS. LAMBERT: The exhibits are the *Acis* opinion, the  
23 arbitration awards or the determinations, both the partial and  
24 the final, and the SEC's original judgment. There are four  
25 exhibits.

1           THE COURT: All right. Well, Mr. Pomerantz, what  
2 would you like to say? One of them I have obviously seen,  
3 since I wrote it.

4           MR. POMERANTZ: Yes, you've written it. You wrote  
5 it.

6           (Laughter.)

7           MR. POMERANTZ: Your Honor, I think this is a tempest  
8 in a teapot. The Committee's brief that it filed in  
9 opposition to the CRO retention, the ordinary course  
10 protocols, and the cash management motion had a litany of  
11 description of the Redeemer litigation, of the SEC litigation.  
12 There are plenty of bad facts out here. Okay? We have an  
13 interim order to seal. There was no hearing set today for our  
14 final hearing.

15          The Trustee has objected to that order, and I suspect that  
16 will be heard on the 21st. We don't think it's appropriate to  
17 introduce the Redeemer award. However, we have read the  
18 redacted provisions or portion of the U.S. Trustee's brief,  
19 and we have no problem if the U.S. Trustee limits its argument  
20 to the redacted portion in presenting that to the Court.

21          In other words, we don't believe that the few sentences  
22 that were redacted need to be redacted.

23          However, to the extent they intend to submit the  
24 arbitration award, we don't think it's appropriate, we don't  
25 think it's necessary, we think Your Honor hit it right, that

1 the issues today are not whether there's mismanagement at the  
2 Debtor. Okay?

3 The U.S. Trustee's position is, notwithstanding this new  
4 structure, it doesn't work. She has a trustee motion on. She  
5 can argue on the 21st that it doesn't work. Nobody is  
6 prejudicing her right to do so.

7 We think it's prejudicial, it's unfair, it's procedurally  
8 improper to submit the Redeemer arbitration award and to allow  
9 the Trustee to do anything other than describe exactly what  
10 she has in her pleading.

11 THE COURT: Okay. I sustain the objection to those  
12 exhibits. Again, I've read them. They're in my brain. I  
13 wrote one of them. But I will allow you to cross-examine Mr.  
14 Sharp. So, Mr. Sharp, would you please come to the witness  
15 stand? Please raise your right hand.

16 BRADLEY SHARP, DEBTOR'S WITNESS, SWORN

17 THE COURT: All right. Please be seated.

18 MS. LAMBERT: To clarify, Your Honor, has the Court  
19 considered the *Acis* opinion and the arbitration opinions based  
20 on judicial notice?

21 THE COURT: And we're doing a lot of hair-splitting  
22 here. I'm just letting you know I -- the facts are in my  
23 brain. You can't extract them from my brain. Okay?

24 MS. LAMBERT: Okay.

25 THE COURT: I know there have been a lot of bad

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1 things, arguably bad things. But to me, the real issue here  
2 today is whether this framework that has been heavily  
3 negotiated with the Committee reflects reasonable business  
4 judgment on the part of the Debtor, is a fair and equitable  
5 resolution of the Committee's, you know, arguments in favor of  
6 a trustee, and whether this makes, you know, sense going  
7 forward to allow this Debtor to go forward without a trustee.  
8 Okay?

9 So I really think that the evidence you want is not  
10 terribly relevant. We technically aren't here on a trustee  
11 motion today. We're here on whether a new board and the  
12 terms, the protocols suggested, reflect reasonable business  
13 judgment and reflect a fair compromise of arguments the  
14 Committee has raised. All right? So I don't know how much  
15 more clear I can make that. I guess the technical answer is  
16 I'm not taking judicial notice of those things for purposes of  
17 today.

18 All right. You may proceed.

19 CROSS-EXAMINATION

20 BY MS. LAMBERT:

21 Q Mr. Strand, can you state your name for --

22 A Sorry. Bradley Sharp, S-H-A-R-P.

23 Q Sharp. Mr. -- oh, sorry.

24 A No relation to Strand.

25 Q All right. Strand is the general partner of the Debtor,

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1 right?

2 A That is correct.

3 Q And there has been no change in the board of the Debtor  
4 except Mr. Dondero's resignation; is that right?

5 A Well, it's a little different, because the -- Strand is  
6 the general partner of the Debtor.

7 Q Yes.

8 A So the new board will be acting and in control of the  
9 Debtor.

10 Q Yes. And there is -- Strand is a non-debtor, correct?

11 A That is correct.

12 Q And the stock of the non-debtor, Strand, is owned by  
13 Dondero?

14 A Mr. Dondero owns Strand Advisors.

15 Q In its entirety?

16 A That is correct.

17 Q So the board will owe a fiduciary duty to Mr. -- to Mr.  
18 Dondero?

19 A The board will have a fiduciary duty to the Debtor and to  
20 Strand Advisors.

21 Q All right.

22 A Their duty is to the entity.

23 Q The -- Strand, as the general partner, as an entity, owes  
24 a fiduciary duty to the Debtor, right?

25 MR. MORRIS: Objection to the extent it calls for a

013026

1 legal conclusion.

2 THE COURT: Sustained.

3 BY MS. LAMBERT:

4 Q Do you know?

5 A As a lay person. I'm not an attorney.

6 Q Okay. So you don't know what the fiduciary roles of the  
7 board will be; is that right?

8 A Well, the fiduciary board will be acting -- you know,  
9 looking at it from my perspective as the chief restructuring  
10 officer, the new board will be acting as the Debtor-in-  
11 Possession. And, you know, they will be directing the Debtor-  
12 in-Possession. You know, the Debtor-in-Possession has duties  
13 to all parties in interest, and they will be directing the  
14 Debtor. They will be directing me as CRO.

15 Q And, in addition, there may be a CEO, right?

16 A That is contemplated, correct.

17 Q It is contemplated? It --

18 A It is -- it is an option that the board has if they think  
19 a CEO is necessary.

20 Q But you don't know whether a CEO is going to be appointed  
21 or not?

22 A That's up to the board.

23 Q And you don't know what the compensation for that  
24 individual might be, right?

25 A Again, that's up to the board.

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1 Q Mr. Dondero is going to be an employee of the Debtor,  
2 right?

3 A That's correct.

4 Q And Mr. Dondero started the Debtor, correct?

5 A I believe so.

6 Q And he also started Strand, right?

7 A I believe that's correct.

8 Q And he is also in control of a number of entities that the  
9 Debtor does business with; is that right?

10 A That is correct.

11 Q Mr. Ellington is going to remain on with the Debtor?

12 A That -- Mr. Ellington is an employee. All employees are  
13 now subject to the board.

14 Q Okay. And Mr. Ellington's role with the Debtor is what?

15 A He is general counsel with the Debtor.

16 Q And there are other in-house attorneys with the Debtor,  
17 right?

18 A That's correct.

19 Q And who else is there currently?

20 A I don't have the list in front of me, you know, the  
21 employee list. As of now, because obviously this is still --  
22 hasn't been effected, so the board has not made any decisions  
23 with respect to any employees going forward.

24 Q And the CFO remains the same?

25 A Yeah, that is, again, as of now. I don't know what the

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1 board is going to do, if anything.

2 Q Do you have any anticipation of what you would recommend  
3 to the board regarding the CFO?

4 A You know, I have many recommendations I have not made to  
5 the board yet. I just met them this morning.

6 Q Are you aware that historically this Court has found that  
7 the lawyers provided bad advice to the Debtor?

8 MR. MORRIS: Objection to the form of the question.

9 THE COURT: Sustained.

10 BY MS. LAMBERT:

11 Q Do you have any knowledge about whether there have been  
12 findings that the law firm gave erroneous advice to the  
13 Debtor? Or, I mean, the in-house counsel gave erroneous  
14 advice.

15 MR. MORRIS: Objection to the form of the question.

16 THE COURT: Sustained.

17 MS. LAMBERT: Your Honor, I'm asking for the  
18 foundation.

19 THE COURT: Rephrase.

20 BY MS. LAMBERT:

21 Q Do you -- are you aware of any concerns about the in-house  
22 counsel?

23 A Yes.

24 Q What is your knowledge?

25 A I have read the rulings from this Court.

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1 Q And what is your understanding of those rulings?

2 A I don't recall specifically. I read that early on when I  
3 was first employed. But there have been concerns with respect  
4 to, you know, management of the Debtor.

5 Q As the CRO, have you made any recommendations to change  
6 employees to date?

7 A As of now, I don't have a -- the board. You know, the  
8 board has just been employed. We have not made  
9 recommendations up to this point. We are still -- obviously,  
10 have been evaluating our position and what needs to happen. I  
11 think it's important for the Debtor at this time, a little  
12 stability would be a good thing for -- until we develop the  
13 direction going forward.

14 Q Are you familiar with the compensation terms for the  
15 directors?

16 A Yes.

17 Q And the directors are employees of Strand but paid by the  
18 Debtor; is that right?

19 A Oh, I'm not sure they're employees of Strand, but they are  
20 paid by the Debtor, their compensation. That's correct.

21 Q And yet the compensation is technically through Strand,  
22 right?

23 A They -- they are. They have to act through the general  
24 partner of the Debtor because of the corporate structure.

25 Q One of the portions of the agreement is that the Committee

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1 acquires litigation claims. Are you familiar with that?

2 A I am.

3 Q Have you parsed out which litigation claims those might be  
4 at this point?

5 A I think the agreement says they have litigation claims  
6 against insiders and related parties. So I don't know what  
7 those individual claims are. I don't know what exists.

8 Q Are you aware that the Committee obtains the attorney-  
9 client privilege and work product privilege?

10 A Yeah. Subject to the terms of those agreements, correct.

11 Q Have you gone through the documents and determined which  
12 ones would fall on -- which attorney files would fall on which  
13 side?

14 A Not as of yet.

15 Q Have you been taking direction from Mr. Dondero?

16 A We've had -- I've had limited interaction with Mr. Dondero  
17 since my retention. You know, we have been complying with the  
18 protocols that we had been negotiating with the Committee and  
19 providing information to the Committee. We have been, as a  
20 result of those protocols, instructing management of the  
21 company on compliance with those protocols. So they have  
22 brought to us transactions that they would like to do. We  
23 have reviewed those transactions and compared it to the  
24 proposed protocols and have been enforcing those. So if  
25 management has asked to do a transaction that does not meet

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1 within those protocols, we have been declining the  
2 transaction. And that -- you know, the company has agreed  
3 with that decision and accepted that decision.

4 Q When you say management, who are you -- to whom are you  
5 referring?

6 A You know, the whole management team at the company. In-  
7 house counsel. The CFO. You know, I've had limited  
8 interaction with Mr. Dondero. One interaction was he did  
9 question one of my decisions that I made. We discussed it and  
10 he accepted my conclusion.

11 Q You're at the Debtor every day?

12 A My team is.

13 Q You are not?

14 A I have had some travel restrictions due to a medical  
15 issue, but I have three of my team there every day.

16 Q Is Mr. Dondero there every day?

17 A I don't know. I don't think so. In the few days I'm  
18 there, I've not seen him.

19 Q Is Mr. Ellington there every day?

20 A No.

21 Q Who on the management team is there every day?

22 A You know, our primary interaction is with Isaac Leventon,  
23 Frank Waterhouse, the CFO. You know, primary interaction, you  
24 know, with David Klos, who is the controller, in dealing with  
25 the financial issues.

1 Obviously, we spend a lot -- my team spends a lot of time  
2 with the head of compliance.

3 Q Were you surprised by this addition that Mr. Dondero would  
4 remain as an employee?

5 A I can't say I was surprised. It is an issue that we  
6 struggle with, given the nature of this company's business.  
7 You know, I see the change in the language and, you know, as  
8 CRO, I am comfortable with it.

9 Q So, as CRO, if Mr. Dondero is necessary now, you recognize  
10 that he was necessary three weeks ago?

11 A I'm not saying that he's necessary. I'm saying that it is  
12 important for the board to be able to make that decision.

13 Q And it wasn't important when the settlement was filed?

14 A It was the -- it was a struggle at the time. I was  
15 concerned at the time it was filed the unintended consequences  
16 of Mr. Dondero resigning completely and disappearing, because  
17 there are a significant number of funds that the Debtor deals  
18 with related parties that are controlled by Mr. Dondero, and I  
19 was worried about the financial impact with it. I knew this  
20 issue was important to the Committee. And if that's something  
21 that the Debtor agreed to and the Committee agreed to, so be  
22 it.

23 You know, I think the last-minute compromise is acceptable  
24 and appropriate. I think the language as negotiated is going  
25 to be very helpful to the Debtor. And I think, then, it's up

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1 to the board to make the decision, with full knowledge on  
2 what's the best avenue forward.

3 Q And the language as negotiated was added because, in the  
4 past, there have been problems with Mr. Dondero changing or  
5 terminating agreements with related entities, right?

6 A There was that -- I've seen that -- issues raised in the  
7 *Acis* case.

8 MS. LAMBERT: No further questions.

9 THE COURT: All right. Any redirect?

10 MR. POMERANTZ: Not from the Debtor.

11 THE COURT: Anyone have examination? No? All right.  
12 Thank you, Mr. Sharp. You're excused.

13 THE WITNESS: Thank you.

14 (The witness steps down.)

15 THE COURT: All right. Are we going to have any  
16 other, I guess, witnesses, evidence?

17 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

18 MR. POMERANTZ: No, Your Honor. I just had a couple  
19 points. One, Ms. Lambert mentioned that she hadn't seen a  
20 copy of the stipulation referred to, which was prohibiting Mr.  
21 Dondero from terminating the board. There's a good reason for  
22 her not having seen it. I hadn't provided it to her. It just  
23 came this morning, right before the hearing. I have one  
24 signed copy. I have other copies that I could represent, even  
25 though they're unsigned, are the same, so I would like to

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1 provide Your Honor. I'll keep the signed copy but provide you  
2 with an unsigned copy, but it's the same, and also give one to  
3 the U.S. Trustee.

4 THE COURT: But you've got a signature of Mr. Dondero  
5 on that?

6 MR. POMERANTZ: Yes, I do.

7 THE COURT: Okay.

8 MR. POMERANTZ: May I approach?

9 THE COURT: You may. Thank you.

10 MR. POMERANTZ: Your Honor, maybe for the record it  
11 would be appropriate for me to show Your Honor the signature,  
12 so you could say that you've seen it?

13 THE COURT: Yes. Yes.

14 MR. POMERANTZ: May I approach again?

15 THE COURT: You may. (Pause.) Okay. Thank you.

16 The record will reflect I've seen Mr. Dondero's signature.

17 MR. POMERANTZ: Your Honor, one of the threads that  
18 Ms. Lambert said to Your Honor is that there were employees  
19 still remaining at the Debtor and that those employees may  
20 have been involved in some wrongdoing.

21 I submit, Your Honor, if Your Honor appointed a Chapter 11  
22 trustee today, what would a Chapter 11 trustee do? A Chapter  
23 11 trustee wouldn't terminate every employee at the Debtor. A  
24 Chapter 11 trustee, if he or she was doing what they should  
25 do, would go down to the company, would interview members of

1 the company, senior management, and decide who should stay on  
2 and who should not stay on.

3 That, I submit, Your Honor, is exactly what this board  
4 will do. So the concept of there being something different  
5 done, if you have a board here or not, I don't think makes  
6 sense.

7 And lastly, Your Honor, Ms. Lambert expressed the issue as  
8 whether it's fair and equitable to resolve the U.S. Trustee  
9 issues in this way. I don't think that's the standard. The  
10 only fair and equitable I understand is in plan confirmation.  
11 I think Your Honor said it straight, which is: Is this a  
12 valid exercise of the Debtor's business judgment and is it an  
13 appropriate compromise of controversy? That is the standard.  
14 And, again, we have always acknowledged that, notwithstanding  
15 how Your Honor rules today, the Trustee reserves the right to  
16 come back to court and argue a trustee is appropriate on the  
17 21st.

18 We believe, Your Honor, that many of the cases, in this  
19 circuit and elsewhere, look to the continuing management of  
20 the company and whether management issues have been addressed  
21 as a significant factor in determining whether a trustee is  
22 appointed. And it'll come as no surprise, of course, if Your  
23 Honor grants our motion today, this will be a lynchpin of our  
24 opposition to the trustee motion.

25 But, again, those issues are for another day, and we



1 believe that we have satisfied our standard, and we request  
2 that Your Honor approve the motion.

3 THE COURT: All right. Other closing arguments?

4 CLOSING ARGUMENT ON BEHALF OF THE UNITED STATES TRUSTEE

5 MS. LAMBERT: Yes, Your Honor. As the Debtor  
6 acknowledges, the Court has no jurisdiction over Strand. This  
7 is a complicated structure. A trustee avoids all of the  
8 complications involved in the Court exercising jurisdiction  
9 over an entity that it doesn't have jurisdiction over.

10 To enter a stock stipulation related to a non-debtor is  
11 highly irregular, and Mr. Dondero is the person behind that.  
12 It has happened in cases where people have been in these kinds  
13 of structures, like that FSLIC used to put in these kinds of  
14 structures -- there's published opinion, the *Goubert*  
15 (phonetic) case -- where the person continued to exercise  
16 control even though they had a stock trust.

17 The Court needs a person beholden to the Court. The  
18 evidence is that, historically, this Debtor has entered into  
19 things that breached its fiduciary duty and resulted in self-  
20 dealing and liability for the Debtor. The evidence is that  
21 these go beyond Mr. Dondero and the Court does not have  
22 jurisdiction over his stock. The Court does not have  
23 jurisdiction over Strand. The board members of Strand are not  
24 employees of the Court, they're employees of Strand, a non-  
25 debtor. These members have a fiduciary duty to Strand.

1 Yes, Strand is the general partner of this Debtor and has  
2 a fiduciary duty, but all these fiduciary duties intermix in  
3 ways that result in conflicts for this case. These conflicts  
4 are unnecessary. The Court could just appoint a trustee who  
5 only owes a fiduciary duty to the members and creditors of  
6 this case, as well as the next (inaudible).

7 There is no evidence that this is cheaper. There is no  
8 evidence that this is a total resolution, because issues are  
9 left open, such as whether or not a CEO is going to be  
10 appointed, how much that person is going to cost.

11 Finally, Your Honor, the sealing has constrained the  
12 ability of some of the parties to understand what's going on  
13 in this case. And that is material to the argument about who  
14 is here, because we don't know who -- that all the people who  
15 would have participated in this discussion had an opportunity  
16 to participate in it.

17 Yes, the creditors have a fiduciary duty, and I believe  
18 that they represented to the best of their ability, but they  
19 are not charged with the issues that others are charged with,  
20 such as the SEC.

21 There is no evidence that the officers are disinterested.  
22 Rather, the new officers are going to be conflicted by the  
23 nature of their position. There's no evidence that it's  
24 cheaper. And a trustee, if appointed, could be appointed on  
25 an hourly basis. This is a Chapter 11 trustee.

1           They argue that the trustee would not have the knowledge,  
2           and yet they've been able to find three candidates to serve  
3           for the board who are qualified. So there's no evidence that  
4           it would not be better to have a trustee for that reason as  
5           well.

6           The evidence is that, historically, the Redeemer Committee  
7           was set up to prevent these kinds of transactions and have  
8           oversight. Historically, the evidence is it did not work.  
9           For this reason, the statute provides a solution, and the  
10          Court should impose it. The Court should deny this motion as  
11          not being in the interest of the estate, as not being a sound  
12          exercise of discretion, because it's really the discretion of  
13          Strand, not the Debtor, and it will remain the discretion of  
14          Strand, not the Debtor.

15          Thank you.

16                 THE COURT: All right. Anyone else have comments?

17                 MR. POMERANTZ: Your Honor, just a couple of minor  
18          points.

19                 THE COURT: Okay.

20                         CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

21                 MR. POMERANTZ: Ms. Lambert started by saying the  
22          Court doesn't have jurisdiction over Strand. I know I just  
23          handed her the stipulation, but the last paragraph of the  
24          stipulation specifically says that the parties stipulate and  
25          agree that the Court shall have exclusive jurisdiction over

1 all matters arising from or related to the interpretation and  
2 implementation of this stipulation and the adjudication of any  
3 parties breaching the stipulation.

4 So the Court does have jurisdiction now that the  
5 stipulation has been signed, assuming that the Court enters  
6 it, so I think that addresses that issue.

7 Your Honor, the evidence of the disinterestedness of the  
8 members of the board, we've provided their *curriculum vitae*.  
9 We've made representations that they have no connections with  
10 the Debtor or any of the parties in interest. We don't think  
11 that, just because they become appointed and become a director  
12 of Strand, that that renders them disinterested [sic], and we  
13 think that the Trustee's arguments that being at a different  
14 level creates different duties is just not -- is not accurate.  
15 I don't think that the Committee would have had any appetite  
16 for this type of structure had they believed that each of  
17 these board members wouldn't feel that their fiduciary duty  
18 was to the Debtor's estate. And they all are seasoned  
19 restructuring people from different aspects, all understand  
20 their fiduciary duties well, and all are prepared to carry  
21 them out.

22 Lastly, the Trustee points to the historic issues, and  
23 specifically mentioned the Redeemer Committee and that  
24 structure didn't work. Well, I think it speaks volumes, Your  
25 Honor, that not only the Redeemer Committee, are they on the

1 Committee and the Committee has supported this motion, but the  
2 Redeemer Committee hasn't come to Your Honor and said that,  
3 notwithstanding that structure that may or may not have been  
4 effective, this structure is ineffective.

5 And at the end, Your Honor, the Trustee is trying to  
6 replace the business judgment of the Debtor. The Debtor is  
7 entitled to deference of the judgment, again, focusing on the  
8 correct standard. And, again, the Trustee will have her day  
9 in -- his day in court in connection with the ultimate trustee  
10 motion on the 21st.

11 Thank you, Your Honor.

12 THE COURT: Anyone else?

13 All right. Well, the Court is going to note a few things  
14 as part of its ruling, obviously. The new proposed  
15 independent board members for Strand, Strand obviously being  
16 the general partner of the Debtor, Highland -- Mr. James  
17 Seery, Mr. John Dubel, and retired Judge Russ Nelms -- are  
18 highly-qualified individuals with respect to the industry.  
19 Some of them with respect to restructuring. Certainly, in the  
20 case of retired Judge Nelms, with regard to fiduciary duties  
21 and the Bankruptcy Code requirements.

22 These three individuals were chosen by the Creditors'  
23 Committee, whose constituency is broad, whose constituency is  
24 owed well over \$100 million. And they were chosen by the  
25 Committee after literally months of negotiation. Obviously,

1 this bankruptcy was filed in October, and it appears to this  
2 Court, from the representations of counsel, that from the very  
3 beginning of the case -- the Committee was, I guess, appointed  
4 a week or two after the case was filed in October -- there's  
5 been haggling over corporate governance of this Debtor.

6 So we have highly-qualified individuals. We have  
7 individuals who were chosen by the well-constituted Creditors'  
8 Committee. And what has been proposed to the Court is that it  
9 is these independent directors that would have sole and  
10 exclusive management and control of the Debtor.

11 An interesting jurisdictional argument has been made, and  
12 it's one of those arguments that, frankly, you know, sounds  
13 good when you first hear it, but when you really drill down  
14 about the governance structure here, I mean, obviously, this  
15 Debtor is a limited partnership and it acts through a general  
16 partner. It's the general partner that controls the Debtor  
17 entity. And while Strand Advisors, Inc., the general partner,  
18 may not technically be in bankruptcy, it's the structure of  
19 these entities such that it controls the Debtor. So the  
20 jurisdictional argument, when you drill down, feels a little  
21 off.

22 Moreover, we have language in the stipulation where Strand  
23 is stipulating and consenting, if you will, to this Court's  
24 exercise of jurisdiction over it.

25 There are many things about the compromise here that have

1 very compelling appeal. Among them, certainly, the Committee  
2 that's negotiated this term sheet retains the right at any  
3 time to move for a Chapter 11 trustee if it believes there are  
4 grounds. The Committee is granted standing to pursue estate  
5 claims, certain estate claims right off the bat, without  
6 having to come back and ask the Court, without having to rely  
7 on the Debtor to pursue that. There are document production  
8 provisions, document preservation provisions, a shared  
9 privilege negotiated, that are very powerful tools for the  
10 Committee, and certainly operating protocols that have been  
11 negotiated regarding the Debtor's operations that are very  
12 powerful tools for the Committee.

13 I said many times during the *Acis* case -- those who were  
14 here will remember -- that the company, *Acis*, was not a great  
15 fit for Chapter 11. Lots of companies aren't great fits for  
16 Chapter 11, I suppose, but the kind of business it was was  
17 kind of tough to maneuver in Chapter 11. Human beings and  
18 their expertise create value. And while we had a Chapter 11  
19 trustee, a stranger come in and take control over *Acis*, you  
20 know, there's great uncertainty whether that stranger is going  
21 to be able to preserve value and have the smooth transition  
22 into Chapter 11 that's really going to be the best fit.

23 Here, as I've said earlier, the legal standard I view as  
24 controlling here is 363 and whether what has been proposed  
25 reflects reasonable business judgment. Is there a sound

1 business justification for proposing the independent slate of  
2 directors at the GP level for the Debtor, the protocols, the  
3 negotiation with the Committee, the document sharing, the  
4 standing given to them? Does all of this reflect reasonable  
5 business judgment? And I find, quite clearly, it does. I  
6 find it to be a pragmatic solution to the Committee's concerns  
7 about existing management and control.

8 And I think I used the words "fair and equitable," not  
9 just Ms. Lambert, because it is also presented to the Court as  
10 a 9019 compromise of disputes with the Committee, and we  
11 traditionally use a fair and equitable and best interest of  
12 the estate analysis in this context. So, to the extent that  
13 applies, I do find this a fair and equitable way of resolving  
14 the disputes with the Committee, and I find this to be in the  
15 best interest of the estate. So I do approve this.

16 And by approving this motion, I'm approving the term sheet  
17 as it's been presented, the various terms therein, the  
18 exhibits thereto. I'm specifically approving the new  
19 independent directors, the document management and  
20 preservation process, the standing to the Committee over  
21 certain of the estate claims, the reporting requirements, the  
22 operating protocols, the whole bundle of provisions.

23 Now, there is one specific thing I want to say about the  
24 role of Mr. Dondero. When Ms. Patel got up and talked about  
25 the newest language that has been added to the term sheet, she



1 highlighted in particular the very last sentence on Page 2 of  
2 the term sheet, the sentence reading, "Mr. Dondero shall not  
3 cause any related entity to terminate any agreements with the  
4 Debtor." Her statement that that was important, it really  
5 resonated with me, because, you know, as I said earlier, I  
6 can't extract what I learned during the *Acis* case, it's in my  
7 brain, and we did have many moments during the *Acis* case where  
8 the Chapter 11 trustee came in and credibly testified that,  
9 whether it was Mr. Dondero personally or others at Highland,  
10 they were surreptitiously liquidating funds, they were  
11 changing agreements, assigning agreements to others. They  
12 were doing things behind the scenes that were impacting the  
13 value of the Debtor in a bad way.

14 So not only do I think that language is very important,  
15 but I am going to require that language to be put in the  
16 order. Okay? So we're not just going to have an order  
17 approving the term sheet that has that language. I want  
18 language specifically in the order. You know, you can figure  
19 out where the appropriate place to stick it in the order is,  
20 but I want specific language in here regarding Mr. Dondero's  
21 role. I also -- the language in there that his role as an  
22 employee of the Debtor will be subject at all times to the  
23 supervision, direction, and authority of the Debtors, I want  
24 that language in there as well. Let's go ahead and put the  
25 language in there that at any time, in any event, the

1 independent directors can determine he's no longer going to be  
2 retained. I want that in the order.

3 And I'm sure most of you can read my mind why, but I want  
4 it crystal clear that if he violates these terms, he's  
5 violated a federal court order, and contempt will be one of  
6 the tools available to the Court. He needs to understand  
7 that. Mr. Ellington needs to understand that. You know, if  
8 there are any games behind the scene, not only do I expect the  
9 Committee is going to come in and highlight that to the Court  
10 and file a motion for a trustee or whatever, but we're going  
11 to have a contempt of court issue.

12 So, anybody want to respond to that?

13 MR. POMERANTZ: Your Honor, Jeff Pomerantz; Pachulski  
14 Stang Ziehl & Jones.

15 We hear Your Honor. What I thought I'd do now is I have a  
16 clean redline of the order, of course not including the  
17 provision you just requested, --

18 THE COURT: Uh-huh.

19 MR. POMERANTZ: -- which we will go back and upload  
20 and hope to get an order signed by Your Honor today, if you're  
21 around. But to go over the other changes, the changes to  
22 Jefferies, the other language changes I discussed before. I  
23 gave a copy to Ms. Lambert and to the Committee. May I  
24 approach with a --

25 THE COURT: You may.

1 MR. POMERANTZ: Thank you.

2 THE COURT: Okay. All right. (Pause.) All right.

3 The form of order looks fine to me. Obviously, you'll add the  
4 Dondero-related language, and we may have further wording  
5 tweaks negotiated with the CLO Issuers. But, again, I approve  
6 all of this. I didn't say on the record the compensation, but  
7 certainly I am approving that as reasonable. I expect these  
8 three directors are going to be working very, very hard. And  
9 so, as you said, not 50,000-foot level monitoring, actually  
10 rolling up sleeves on-site, so I think the compensation is  
11 reasonable.

12 MR. POMERANTZ: Thank you, Your Honor. We will  
13 submit an order shortly that includes Your Honor's language  
14 requested.

15 THE COURT: Okay.

16 MR. POMERANTZ: Are you around this afternoon?

17 THE COURT: I am around, --

18 MR. POMERANTZ: Okay.

19 THE COURT: -- so just pick up the phone or send an  
20 email to Traci, my courtroom deputy, --

21 MR. POMERANTZ: Yes.

22 THE COURT: -- so she can tell me, "It's in your  
23 queue to sign."

24 MR. POMERANTZ: She has been extremely helpful and  
25 responsive.

1 THE COURT: Good. I'm glad to hear that.

2 MR. POMERANTZ: Yes.

3 THE COURT: Now, as far as future scheduling, I did  
4 have her sitting by, listening, in case we needed to discuss  
5 anything. Obviously, we're going to have a kind of a  
6 carryover placeholder on the 21st as part of the trustee  
7 motion hearing for any remaining issues with the CLO Issuer.  
8 And, you know, that's just a placeholder if necessary to hear  
9 language controversies.

10 My courtroom deputy was concerned, because you have a lot  
11 of pending motions that have just sort of sat there pending  
12 because this was the big issue, right? She wants to make sure  
13 she sets anything you need a setting on. And I don't know if  
14 you want to discuss that today or go back as a group and --

15 MR. POMERANTZ: We're happy to -- I think, you know,  
16 I think that's appropriate to do. We had the motion to  
17 appoint the CRO.

18 THE COURT: Uh-huh.

19 MR. POMERANTZ: That was pending. That gets resolved  
20 by this motion. We will submit an order --

21 THE COURT: Okay.

22 MR. POMERANTZ: -- with the new agreement that was  
23 attached to the term sheet.

24 We had the cash management order which Judge Sontchi had  
25 issued an interim order. We will have a final order with

1 respect to that.

2 THE COURT: Okay.

3 MR. POMERANTZ: We will be withdrawing the motion to  
4 approve ordinary course protocols which was originally on for  
5 hearing.

6 THE COURT: Uh-huh.

7 MR. POMERANTZ: I think on the 21st we have currently  
8 set a motion to approve the retention or Mercer, which is the  
9 Debtor's compensation consultant, --

10 THE COURT: Uh-huh.

11 MR. POMERANTZ: -- and an analog motion that was  
12 originally set for today with respect to insiders, non-  
13 insiders, but is on for non-insiders and insiders on the 21st,  
14 --

15 THE COURT: Uh-huh.

16 MR. POMERANTZ: -- which is the motion to approve  
17 bonuses.

18 THE COURT: Uh-huh.

19 MR. POMERANTZ: Of course, the Debtor's new board is  
20 going to be wanting to very carefully review that. And we are  
21 going back and today having our first new board meeting with  
22 the board to start bringing them up to speed. But we  
23 presently intend, subject to, obviously, their direction, to  
24 go forward on the 21st.

25 We also have the retention of Lynn Pinker and Foley

1 Gardere, which had been filed and was brought on for hearing  
2 previously. It had been delayed, again, for the board to look  
3 at the issues. We expect to have that on for the 21st. And I  
4 believe, I believe that would be it.

5 MS. LAMBERT: No, Your Honor, the --

6 MR. POMERANTZ: No?

7 MS. LAMBERT: -- U.S. Trustee has objected to the  
8 motion to seal, which was the second item on the Wilmington  
9 Court's docket that got -- and it got transferred here. The  
10 U.S. Trustee has also objected to the motion for protective  
11 order. The issues overlap. We request that they be set as  
12 quickly as possible.

13 MR. POMERANTZ: We're happy to set both of those for  
14 the 21st as well.

15 THE COURT: All right. So I think what I'm going to  
16 ask you to do is just get on the phone, one of you, with Traci  
17 and just make sure she's clear on everything you need set on  
18 the 21st, and then you can do a big notice of hearing, just  
19 kind of listing all of these matters.

20 MR. POMERANTZ: Your Honor, with respect to the CRO  
21 motion -- order and the cash management order, I was wondering  
22 if it would be helpful for my colleague Mr. Demo to go over  
23 the amendments to those orders -- we would like those to be  
24 entered today -- to see if Your Honor has any questions.

25 THE COURT: All right. That would be good. Mr.

1 Clemente, did you have something first?

2 MR. CLEMENTE: Just very quickly, Your Honor. We had  
3 filed our retention applications for the Committee  
4 professionals and filed CNOs, and your office had indicated  
5 you wanted to get through today, which I totally understand,  
6 but I just wanted to make sure that Your Honor didn't lose  
7 sight of those. I don't believe there were any objections to  
8 those, but I think your intent was probably to deal with them  
9 after today, but I just wanted to --

10 THE COURT: All right. Yes, it was to get through  
11 today.

12 MR. CLEMENTE: Yes.

13 THE COURT: So, since you've had plenty of time run  
14 on those, you can submit orders and I'll get them signed in  
15 chambers.

16 MR. CLEMENTE: Thank you very much, Your Honor.  
17 Appreciate it.

18 THE COURT: Okay. Thank you. Counsel?

19 MR. DEMO: Good afternoon, Your Honor. Greg Demo,  
20 Pachulski Stang, on behalf of the Debtor. I'm happy to keep  
21 this as brief as possible, but I think walking through the  
22 cash management motion has the most changes.

23 THE COURT: Okay.

24 MR. DEMO: The biggest change there, and we had  
25 discussed this with the United Stated Trustee in Delaware, is

1 that in our initial motion we disclosed that the Debtor had  
2 bank accounts at BBVA and then also at NexBank. Those  
3 accounts have been moved to East West Bank, --

4 THE COURT: Okay.

5 MR. DEMO: -- which is a party to a depository  
6 agreement with the United Stated Trustee.

7 THE COURT: Okay.

8 MR. DEMO: The only exception to that is a  
9 certificate of deposit that is at NexBank. It's a relatively  
10 small amount of money. It's \$135,000. But it also is pledged  
11 as collateral on a lease. So that has been -- proven  
12 problematic to move. The Trustee for Delaware did say that  
13 was okay. I would hope that the Trustee for Texas would agree  
14 with that. We did disclose it in the initial debtor  
15 interview.

16 But those are the bank accounts. The bank accounts at  
17 BBVA and NexBank, with the exception of that CD, were all  
18 closed as of yesterday.

19 THE COURT: Okay.

20 MR. DEMO: So now we are going to be using East West  
21 Bank for all operating accounts, all cash, going forward.

22 The other two accounts are the account at Jefferies, which  
23 is the prime brokerage account.

24 THE COURT: Uh-huh.

25 MR. DEMO: That account, we are keeping open.



1 Obviously, there have been conversations with Jefferies that  
2 are going to be reflected in the proposed order on the  
3 settlement, but we do propose to keep the Jefferies prime  
4 brokerage account open as well.

5 And then we filed a supplement for another prime brokerage  
6 account that we have at a prime broker called Maxim Group.  
7 That account has \$30 million in securities in it, give or  
8 take, and then literally like \$100 in cash. The Debtor  
9 considers that account more an investment than actual  
10 operating account, but we would like to keep that account open  
11 as well, just so it can continue holding those securities.

12 Jefferies and Maxim, neither of them are on the depository  
13 list, so we are requesting a waiver of 345(b) for those two  
14 accounts, and then also requesting a waiver of 345(b) with  
15 respect to the certificate of deposit at NexBank.

16 THE COURT: Okay.

17 MR. DEMO: That's where we're at at cash management.  
18 And I guess, sorry, one more thing. In the original cash  
19 management motion, we had a series of intercompany  
20 transactions that we disclosed, and we had gotten interim  
21 relief from the Delaware court to make those payments up to a  
22 hundred -- or, \$1.7 million. We are below that account, and  
23 on a go-forward basis, all of those intercompany transactions  
24 are getting subsumed into the settlement motion and the  
25 operating protocols and all of that. But we are asking for

1 final relief on the intercompany transactions that we made  
2 under the interim order.

3 THE COURT: Okay. All right. Who wishes to be heard  
4 on this? I don't know how much discussion we've had outside  
5 the courtroom on this.

6 MS. LAMBERT: We haven't -- normally, a bond would be  
7 appropriate for the Jefferies and the other small account.  
8 The estate is at risk on the CD, but it's not that much money.  
9 It's not worth bonding. It'll be more expensive to bond it.

10 NexBank, as you know, Your Honor, is a bank where Mr.  
11 Dondero is the CEO. So that was part of the reason that  
12 NexBank was carved out. But the -- so I would like them to  
13 bid bonds on the Jefferies and the other account. And if we  
14 -- let's carry it on those issues so that we can see how  
15 expensive bonding it would be, and if it's cost-prohibitive,  
16 maybe we reconsider. But in the past, the bonds haven't been  
17 very expensive, relatively.

18 MR. DEMO: We're happy to discuss that with the U.S.  
19 Trustee. I mean, just for the record, the Jefferies account,  
20 you know, does support a margin loan. It's \$80 million in  
21 securities. It's \$30 million at Maxim. They're SIPC. I  
22 mean, it's Jefferies and, you know, another large prime  
23 broker. Again, we're happy to discuss it with the Trustee. I  
24 don't know that it's necessary, but we will discuss it.

25 THE COURT: Okay. Well, you all can discuss it, and

1 if you have an unopposed order, an agreed order, --

2 MR. DEMO: Uh-huh.

3 THE COURT: -- you can upload it and I'll sign it.

4 Otherwise, if you need hearing time on the 21st, --

5 MR. DEMO: Okay.

6 THE COURT: -- we'll get it all figured out then and

7 --

8 MR. DEMO: Okay. All right.

9 THE COURT: -- resolve it then.

10 MR. DEMO: Thank you, Your Honor. And then I guess  
11 the other motion is the CRO retention. This one should  
12 hopefully be pretty brief. We are just filing a new proposed  
13 order that attaches the engagement letter, as has been  
14 modified by all of the settlement discussions. I believe the  
15 Committee is on board with that, and it's consistent. It was  
16 one of the attachments that you approved this morning in  
17 connection with the settlement.

18 THE COURT: All right. Comments on that?

19 A VOICE: None, Your Honor.

20 THE COURT: Committee, you're good?

21 MS. LAMBERT: The U.S. Trustee had also objected to  
22 the CRO motion, but it's some of the same issues that the  
23 Committee raised. And the CRO, my understanding, is now not  
24 an employee of the board but totally overseen by the board,  
25 and with that, we can withdraw our objection.

1 THE COURT: All right. Very good. I'll sign your  
2 order on the CRO, then.

3 MR. DEMO: Okay. Thank you, Your Honor.

4 THE COURT: All right. Well, if there's nothing  
5 else, I'll be on the lookout for your orders. And, again, if  
6 you could coordinate with Traci to make sure she's clear on  
7 everything you need set on the 21st.

8 MR. POMERANTZ: Thank you very much, Your Honor.

9 THE COURT: All right.

10 MR. CLEMENTE: Thank you, Your Honor.

11 MR. DEMO: Thank you, Your Honor.

12 THE CLERK: All rise.

13 (Proceedings concluded at 11:54 a.m.)

14 --oOo--

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19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from  
22 the electronic sound recording of the proceedings in the  
above-entitled matter.

23 **/s/ Kathy Rehling**

**12/10/2020**

24

25 Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

\_\_\_\_\_  
Date

013056

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## **EXHIBIT SSSSSS**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
) Chapter 11  
)  
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) Tuesday, October 27, 2020  
) 10:30 a.m. Docket  
Debtor. )  
) - AMENDED DISCLOSURE STATEMENT  
) (#1080)  
) - MOTION FOR ENTRY OF AN ORDER  
) APPROVING THE ADEQUACY OF  
) THE DISCLOSURE STATEMENT  
) (#1108)  
)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor: Jeffrey N. Pomerantz  
Ira D. Kharasch  
PACHULSKI STANG ZIEHL & JONES, LLP  
10100 Santa Monica Blvd.,  
13th Floor  
Los Angeles, CA 90067  
(310) 277-6910

For the Debtor: Gregory V. Demo  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

For the Official Committee of Unsecured Creditors: Matthew A. Clemente  
SIDLEY AUSTIN, LLP  
One South Dearborn  
Chicago, IL 60603  
(312) 853-7539

For the Official Committee of Unsecured Creditors: Penny P. Reid  
SIDLEY AUSTIN, LLP  
2021 McKinney Avenue, Suite 2000  
Dallas, TX 75201  
(214) 981-3413

1 APPEARANCES, cont'd.:

2 For UBS Securities: Kimberly A. Posin  
3 LATHAM & WATKINS, LLP  
4 355 South Grand Avenue, Suite 100  
Los Angeles, CA 90071-1560  
(213) 891-7322

5 For Acis Capital Rakhee V. Patel  
6 Management, GP, LLC: Annmarie Antoinette Chiarello  
7 WINSTEAD, P.C.  
2728 N. Harwood Street, Suite 500  
8 Dallas, TX 75201  
(214) 745-5250

9 For Redeemer Committee of Terri L. Mascherin  
10 the Highland Crusader JENNER & BLOCK, LLP  
Fund: 353 N. Clark Street  
Chicago, IL 60654-3456  
(312) 923-2799

11 For Redeemer Committee of Mark B. Hankin  
12 the Highland Crusader JENNER & BLOCK, LLP  
Fund: 919 Third Avenue  
13 New York, NY 10022-3098  
(212) 891-1600

14 For Redeemer Committee of Mark A. Platt  
15 the Highland Crusader FROST BROWN TODD, LLC  
Fund: 100 Crescent Court, Suite 350  
16 Dallas, TX 75201  
(214) 580-5852

17 For Patrick Daugherty: Jason Patrick Kathman  
18 PRONSKE & KATHMAN, P.C.  
2701 Dallas Parkway, Suite 590  
19 Plano, TX 75093  
(214) 658-6500

20 For HarbourVest, et al.: Daniel E. Stroik  
21 DEBEVOISE & PLIMPTON, LLP  
919 Third Avenue  
22 New York, NY 10022  
(212) 909-6621

23

24

25



1 APPEARANCES, cont'd.:

2 For the U.S. Trustee: Lisa L. Lambert  
3 OFFICE OF THE UNITED STATES  
4 TRUSTEE  
5 1100 Commerce Street, Room 976  
6 Dallas, TX 75242  
7 (214) 767-8967

8 For the Pension Benefit Michael I. Baird  
9 Guaranty Corporation: PENSION BENEFIT GUARANTY  
10 CORPORATION  
11 Office of the General Counsel  
12 1200 K Street, N.W.  
13 Washington, D.C. 20005  
14 (202) 326-4020 Ext. 3946

15 Recorded by: Michael F. Edmond, Sr.  
16 UNITED STATES BANKRUPTCY COURT  
17 1100 Commerce Street, 12th Floor  
18 Dallas, TX 75242  
19 (214) 753-2062

20 Transcribed by: Kathy Rehling  
21 311 Paradise Cove  
22 Shady Shores, TX 76208  
23 (972) 786-3063

24  
25 Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

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1                   DALLAS, TEXAS - OCTOBER 27, 2020 - 10:38 A.M.

2                   THE COURT: A Highland hearing this morning regarding  
3 the disclosure statement. I know we have a lot of people on  
4 the phone, so let me try to do the quickest roll call I can  
5 here. For the Debtor team, who do we have appearing?

6                   MR. POMERANTZ: Good morning, Your Honor. Jeffrey  
7 Pomerantz along with Ari Kharasch and Greg Demo on behalf of  
8 the Debtor-in-Possession.

9                   THE COURT: All right. Good morning.

10                  MR. POMERANTZ: Also on the line is James Seery, the  
11 chief executive officer of the Debtor.

12                  THE COURT: Thank you. All right. For the Unsecured  
13 Creditors' Committee, who do we have appearing?

14                  MR. CLEMENTE: Good morning, Your Honor. Matthew  
15 Clemente; Sidley Austin; on behalf of the Committee. And my  
16 partner Penny Reid is also with me today.

17                  THE COURT: All right. Good morning to you. All  
18 right. Let's, I guess, next go to UBS. Do we have a team for  
19 UBS appearing?

20                  MS. POSIN: Good morning, Your Honor. Kim Posin of  
21 Latham & Watkins, counsel for UBS.

22                  THE COURT: All right. Thank you. All right. What  
23 about Acis? I'm not sure if you have pending disclosure  
24 statement objections, but I'll go ahead and hear any  
25 appearances for Acis.

1 MS. PATEL: Rakhee Patel and Annmarie Chiarello on  
2 behalf of Acis Capital Management, LP, appearing.

3 THE COURT: All right. Thank you. What about the  
4 Redeemer Committee? Anyone here for them?

5 MS. MASCHERIN: Yes, Your Honor. Terri Mascherin;  
6 Jenner & Block, LLP. From my firm, Mark Hankin. And also our  
7 local counsel, Mark Platt from Frost Brown Todd, appearing for  
8 the Redeemer Committee.

9 THE COURT: All right. Good morning. All right.  
10 Pat Daugherty. We have an objection. Who is there for Pat  
11 Daugherty?

12 MR. KATHMAN: Good morning, Your Honor. Jason  
13 Kathman on behalf of Pat Daugherty.

14 THE COURT: Good morning. All right. HarbourVest.  
15 Do we have someone appearing for HarbourVest?

16 MR. STROIK: Yes, Your Honor. Good morning. This is  
17 Daniel Stroik from Debevoise & Plimpton representing  
18 HarbourVest.

19 THE COURT: All right. Thank you, Mr. Stroik.

20 Well, the PBGC had an objection. Do we have someone for  
21 the PBGC? (No response.) All right. If you're trying to  
22 appear, I do not hear you, so make sure you unmute your  
23 device. (No response.) All right. Maybe not.

24 We had an objection from Jeffries. Do we have anyone from  
25 Jeffries on the line? (No response.) All right. Maybe not.

1 Is there anyone else who wished to appear who has not  
2 appeared? (No response.)

3 U.S. Trustee, by chance?

4 MS. LAMBERT: Judge Jernigan, this is Lisa Lambert.  
5 I am on the phone, and I am aware that the PBGC had worked on  
6 some comments. We had made comments informally with the  
7 Debtor, because the U.S. Trustee's objections were subsumed in  
8 other objections and (garbled). But they go to confirmation  
9 and (garbled) those objections. I don't think we need to make  
10 an appearance today.

11 THE COURT: Okay.

12 MS. LAMBERT: Or we don't need to advocate today.

13 THE COURT: All right. Thank you.

14 All right. Last call. Anyone else wishing to appear?  
15 (No response.)

16 All right. Well, I will remind folks that, here in the  
17 courtroom, we will often mute everyone's devices when we hear  
18 background noise. Rather than ferreting out who was the  
19 offender, we'll just mute everyone. So if you wish to talk  
20 and you think you've not muted yourself, you may still be  
21 muted because the Court did it. So, please make sure when you  
22 want to talk you unmute your device.

23 All right. Well, Mr. Pomerantz, are you going to kick  
24 things off and let us know where things stand on the second  
25 amended disclosure statement?

1 MR. POMERANTZ: Yes, I am, Your Honor. I will  
2 present on the disclosure statement, and then I will have Mr.  
3 Demo present on the actual solicitation procedures and also go  
4 through the proposed timing for the dates that follow, if that  
5 is okay with Your Honor.

6 THE COURT: All right.

7 MR. POMERANTZ: So, good morning, Your Honor, and  
8 thank you for agreeing to continue the hearing from last  
9 Thursday. We have put the time to good use and have worked  
10 hard to address many of the issues that were raised by the  
11 objections and to try to narrow the remaining disputes. We  
12 think we've been partly successful. We haven't resolved  
13 everything. But I think you'll find that the disputes have  
14 narrowed.

15 Sunday evening, we filed revised versions of the plan and  
16 disclosure statement reflecting changes made from the last  
17 versions filed with the Court. We also filed a reply, which  
18 attached as Exhibit B a chart that summarized all the  
19 objections and the Debtor's response thereto. And then last  
20 night we filed an additional proceeding that identified a  
21 handful of additional disclosure changes we would propose  
22 adding to the disclosure statement which is solicited for  
23 voting.

24 At the outset, Your Honor, I would like to focus the Court  
25 on what is coming before the Court. Today, the Debtor seeks a

1 finding by the Court that the disclosure statement provides  
2 adequate information within the meaning of Section 1125 of the  
3 Bankruptcy Code. And the Debtor therefore requests approval  
4 of the disclosure statement so that the Debtor may solicit  
5 votes in connection with the second amended plan.

6 The plan essentially contemplates a transfer of assets to  
7 the Claimant Trust, which would monetize those assets in a  
8 manner designed to maximize value.

9 The Debtor received five substantive objections to the  
10 disclosure statement: From the Committee; HarbourVest;  
11 Daugherty; PBGC; and a late-filed objection from UBS. The  
12 Debtor also received a reservation of rights from Jeffries,  
13 the Class 1 creditor, and three joinders to the Committee  
14 objection by the Redeemer Committee, Acis, and Meta-e.

15 To address those concerns, Your Honor, the disclosure  
16 statement has been amended to do the following: With respect  
17 to the Committee's disclosure statement objections, the  
18 disclosure statement now includes a more robust discussion  
19 surrounding the risks in the plan. It adds additional  
20 references to the Committee not supporting the plan.

21 We have also received a draft of the Committee letter  
22 urging the creditors to vote against the plan. We have  
23 provided some comments, which the Committee has accepted, and  
24 we have no objection to the letter being included in the  
25 solicitation material.

1       The disclosure statement also clarifies certain statements  
2       the Committee wanted clarified concerning the nature of the  
3       plan.

4       To address UBS's disclosure concerns, the disclosure  
5       statement now contains an estimate of the amount of claims and  
6       recoveries for creditors under the plan. It includes  
7       discussion regarding the HarbourVest and HVA claims. It  
8       references the summary judgment motion filed with respect to  
9       the UBS claims.

10       UBS did not provide us with additional disclosure  
11       regarding how it wanted its claims identified. We believe, as  
12       it sits today, the disclosure statement is sufficient in that  
13       regard.

14       The disclosure statement also contains references to the  
15       Court's approval last week of the Redeemer Committee  
16       settlement, and it also contains additional information to  
17       supplement the explanation of why the Debtor's assets have  
18       declined in value during the course of this case.

19       To address HarbourVest's concerns, the disclosure  
20       statement now includes disclosure regarding the nature of  
21       HarbourVest's claims against the estate and the Debtor's  
22       responses.

23       And to address the various concerns, the disclosure  
24       statement now contains an explanation of the difference  
25       between the book value of the Debtor's assets and the expected

1 distributable value from those assets, net of expenses.

2 Lastly, to address the PBGC's concerns, the disclosure  
3 statement adds additional language regarding the Debtor's  
4 pension plan and the Debtor's -- or PBGC's reservation of  
5 rights in connection therewith. That language has been agreed  
6 to by the PBGC, and I suspect that is the reason why they may  
7 not be appearing today.

8 Your Honor, with respect to the filing of the plan  
9 supplement, the motion to approve the disclosure statement  
10 actually had committed to file the supplement seven days in  
11 advance of the voting and of the objection deadline. There  
12 was an inconsistency in the plan which indicated it'd be filed  
13 on the voting deadline. Certain creditors picked that up, and  
14 that's now been clarified.

15 And Your Honor, we would submit that courts in this  
16 district have routinely approved the filing of a plan  
17 supplement on this timeline, as reflected by the several case  
18 citations contained in our reply.

19 The plan supplement will include documents necessary for  
20 implementation of the plan, including the Claimant Trust  
21 Agreement, which will address a variety of issues. We  
22 identify the members of the Claim Oversight Committee and the  
23 Claimant Trustee, their respective compensation, the rights  
24 and responsibilities of the Claim Oversight Committee and the  
25 Claimant Trustee, and detail provisions regarding the



1 establishment and rules regarding a disputed claims reserve  
2 which the Debtor contemplates will be substantially similar to  
3 disputed claims reserves in other classes.

4 While certain parties have taken issue with the issue --  
5 with the information included in the plan projections and the  
6 liquidation analysis, the Debtor believes that the documents  
7 attached to the disclosure statement --

8 (Interruption.)

9 THE COURT: It's Mr. Baird. All right, Mr. Baird.  
10 That was a distraction. All right. We've got you on mute  
11 now.

12 Mr. Pomerantz, continue.

13 MR. POMERANTZ: Okay. While some parties have taken  
14 issue with the information included in the plan projections  
15 and the liquidation analysis, Your Honor, the Debtor believes  
16 that the documents attached to the disclosure statement are  
17 sufficient, that no additional disclosure is necessary at  
18 this time.

19 Accordingly, the Debtor believes that the second amended  
20 disclosure statement contains adequate information and this  
21 Court should authorize the Debtor to solicit votes in  
22 connection therewith.

23 However, certain parties, Your Honor -- principally, the  
24 Committee -- have nonetheless argued to the Court that the  
25 plan contains fatal flaws, is not confirmable, and that the

1 Court should short-circuit the plan process before it has  
2 begun.

3 The Committee appears to want to turn this hearing into a  
4 confirmation hearing, litigating a small subset of issues  
5 that have eluded resolution thus far. The theme running  
6 through the Committee's objection is that because the Debtor  
7 is insolvent the Debtor has no real role in the confirmation  
8 process and should essentially step aside and accede to any  
9 demand the Committee makes.

10 Your Honor, the Debtor disagrees. First, as a threshold  
11 matter, the Debtor does not admit that it is insolvent.  
12 While the base case projections attached to the disclosure  
13 statement contemplate less than a hundred percent recovery to  
14 General Unsecured Creditors, the Debtors believe that those  
15 projections are conservative and that there is a possibility  
16 that the Debtor would generate sufficient funds to pay all  
17 creditors, including General Unsecured Creditors, in full.

18 However, Your Honor, the issue of insolvency is really a  
19 red herring. Even if the Debtor is insolvent, it does not  
20 mean that the Committee should be able to dictate to the  
21 Debtor the type of plan it should be pursuing -- it thinks  
22 should be pursued, have veto right over all documents, et  
23 cetera. There is just no concept in the Bankruptcy Code of a  
24 committee-in-possession.

25 If insolvency was the determining factor of who can --

1 who should control what is in a plan, then Committees should  
2 be able to dictate how cases proceed in the vast majority of  
3 cases that are filed in this Court and around the country  
4 where the debtors are admittedly insolvent. Your Honor, as a  
5 debtor-in-possession, the Debtor has a fiduciary duty to all  
6 stakeholders, and is entitled to pursue confirmation of a  
7 plan that it believes is in the best interests of the estate  
8 and meets the confirmation requirements of Section 1129.

9 That is not to say, Your Honor, that the Committee's  
10 views and that of its members are not relevant and should be  
11 ignored. And the Debtor has not ignored the Committee at  
12 all. Over the last several weeks, the Debtor has made  
13 substantial progress with the Committee to resolve  
14 outstanding issues, and is hopeful that at the time of  
15 confirmation the Committee will support the plan, and its  
16 members, like other General Unsecured Creditors, will vote in  
17 favor of the plan.

18 However, Your Honor, even if the Committee does not  
19 support the plan and some of the Committee members vote to  
20 reject the plan, the plan is still able to meet the  
21 confirmation requirements -- excuse me, Your Honor -- of  
22 Section 1129 of the Code.

23 In any event, Your Honor, each of the issues that the  
24 Committee and the other parties raised regarding confirmation  
25 do not render the plan patently unconfirmable such that the

1 Debtor should be prohibited from soliciting votes on the  
2 plan, nor do they justify the disenfranchisement of the  
3 Debtor's other stakeholders.

4 While these confirmation issues are not presently before  
5 Your Honor, I just would like to briefly address the  
6 principle confirmation issues raised by the Committee, UBS,  
7 and Daugherty.

8 The first issue, which there has been a lot of papers on,  
9 are the releases. As Your Honor is aware, it is usual and  
10 customary in Chapter 11 cases. This plan, as initially  
11 filed, contained releases for the Debtor, its officers,  
12 directors, employees, and agents, subject to standard carve-  
13 outs for gross negligence and willful misconduct.

14 The Committee argued that the releases were improper  
15 under Fifth Circuit law. They argued that the Debtor did not  
16 identify who would be released, nor what consideration was  
17 being provided for those releases. And the Debtor has  
18 addressed several of the Committee's concerns by  
19 modifications it made to the releases in the recently-filed  
20 plan.

21 First, and I know it's an issue of focus for everyone in  
22 this case, the plan now makes clear that not only are James  
23 Dondero and Mark Okada excluded from the release, but also  
24 NexPoint Advisors, NexBank, Highland CLO Funding, the  
25 (inaudible) Fund, Highland Capital Management Fund Advisors,

1 CLO Holdco, Dugaboy, and the related entities are  
2 specifically carved out for the release.

3 The release, as it presently stands, essentially covers  
4 the employees, officers and directors who have worked hard  
5 during the course of this case to get the case to where it is  
6 today and have done everything that the independent board has  
7 asked of them in the process.

8 Second, Your Honor, the Debtor has expanded the carve-  
9 outs to the release to not only include gross negligence and  
10 willful misconduct, but also to include avoidance actions.

11 And lastly, Your Honor, to address the issue of  
12 consideration, the plan now provides that the employees will  
13 forfeit their releases if they do not cooperate with the  
14 Claimant Trustee in monetizing assets or objecting to claims.  
15 This cooperation requirement will apply whether or not the  
16 person is employed by the Claimant Trust after the effective  
17 date.

18 The determination of whether an employee has cooperated  
19 will be made by the Claimant Trustee, subject to the  
20 agreement of the independent members of the Claim Oversight  
21 Committee.

22 Accordingly, Your Honor, at confirmation, the Court will  
23 have to decide whether this consideration is sufficient to  
24 support the releases.

25 I would note, Your Honor, that the Debtor is not aware of

1 any claims that exist against any of these parties being  
2 released.

3 The Committee is granted exclusively authority to  
4 investigate and prosecute claims against these parties. And  
5 while the Debtor understands that the Committee's  
6 investigation may be (garbled), the fact is the Committee has  
7 not identified any such claims yet.

8 However, it does bear repeating that the releases contain  
9 broad carve-outs for gross negligence, willful misconduct,  
10 and avoidance actions. As such, if the Committee, or  
11 subsequently the Litigation Trustee, determine that there are  
12 causes of action against any of the released parties and  
13 those causes of action fall within the carve-out, the  
14 Litigation Trustee will be able to still pursue those actions  
15 under the plan.

16 Because of the broad carve-outs, the releases essentially  
17 are only releasing claims for things like simple negligence.

18 Accordingly, Your Honor, there is nothing patently  
19 unconfirmable about the Debtor releases, and the Debtor will  
20 be prepared to carry its burden at confirmation to  
21 demonstrate that the releases are justified.

22 A dispute over whether the plan will or will not include  
23 the releases and the scope of those releases is not properly  
24 decided at this hearing, which is simply to determine the  
25 adequacy of disclosure.

1       The next issue, Your Honor, is issues regarding  
2       classification. The Committee raised several issues  
3       regarding the Debtor's classification of General Unsecured  
4       Creditors. First, the Committee requested that the employee  
5       claims, which are essentially bonuses that certain senior  
6       management employees were entitled to receive during the  
7       course of the case but did not, be collapsed into the general  
8       convenience class that is now Class 7 under the plan. The  
9       Debtor agreed to make that change.

10       Second, the Committee requested that the threshold for  
11       convenience claims be reduced to \$1 million instead of \$2.5  
12       million. The Debtor agreed to make those changes, but unlike  
13       the Committee's request, the Debtor felt it was appropriate  
14       to allow any creditors to be able to reduce their claims to a  
15       million dollars and elect convenience class treatment. So  
16       the Debtor's plan, which has not been agreed to by the  
17       Committee, contains an opt-in to the convenience class.

18       Third, the Committee requested that the distribution to  
19       convenience creditors be increased from 75 percent to 85  
20       percent. The Debtor agreed to make that change.

21       And lastly, the Committee requested that holders of  
22       convenience class claims be permitted to opt in to the  
23       general treatment of unsecured claims in Class 8 if they  
24       prefer to roll the dice and ultimately the chance to receive  
25       100 percent of their claims over time in lieu of 85 percent.

1 And the Debtor has agreed to make that change.

2 So Your Honor, other than the opt-in issue, which, again,  
3 is not a disclosure statement issue, the Debtor believes it's  
4 adequately addressed the Committee's classification issues.

5 The Debtor has also created a new Class 6 under the  
6 amended plan which includes the paid time off claims of  
7 employees in excess of the statutory cap. These claims are  
8 expected in the aggregate to be no more than \$760,000, and  
9 the plan now treats them as unimpaired.

10 Patrick Daugherty has argued that the separation of  
11 Unsecured Creditor claims into a convenience class and to a  
12 general unsecured class is improper. The issue is a  
13 confirmation issue as well, Your Honor, but I will say that  
14 the creation of an administrative convenience class under a  
15 plan is customary in Chapter 11 plans and is not prohibited  
16 under Fifth Circuit law.

17 The Debtor did not create that plan to gerrymander votes,  
18 but rather to recognize that creditors with relatively small  
19 claims in the context of this case should be cashed out for a  
20 discount, or at least offered the opportunity to be cashed  
21 out at a discount, and not be lumped in with a class  
22 consisting of primarily large litigation claims, many of  
23 which are unliquidated.

24 Next, Your Honor, a dispute has arisen between the Debtor  
25 and the Committee regarding the appropriate interest rate to



1 be provided to General Unsecured Creditors if the Debtor ends  
2 up being solvent. Both the Debtor and the Committee seem to  
3 agree that the appropriate rate from the petition date to the  
4 effective date is the federal judgment rate.

5 The parties, however, disagree on the appropriate rate  
6 from the effective date until the date of payment. However,  
7 Your Honor, interest in a solvent case, that's a legal issue,  
8 that's a confirmation issue, and Your Honor does not have to  
9 decide that issue today.

10 Lastly, Your Honor, the Committee has raised concerns  
11 about whether the Debtor should have a say in certain plan-  
12 related issues. Consistent with its position that the  
13 Committee should control the plan process and the Debtor  
14 should essentially just act as a scrivener, the Committee  
15 does not believe that the Debtor's reasonable consent should  
16 be required for the identity of the independent members of  
17 the Claimant Oversight Committee, the identity of the  
18 Claimant Trustee, the form of the Claimant Trust Agreement,  
19 or the form of the other transactional documents to implement  
20 the plan.

21 The Debtor just has a philosophical disagreement with the  
22 Committee. As a debtor-in-possession, the Debtor's plan, the  
23 Debtor should have reasonable consent rights with respect to  
24 these matters.

25 However, Your Honor, to avoid what the Debtor believes is

1 ultimately a theoretical as opposed to practical issue, the  
2 Debtor has urged the Committee to engage with the Debtor on  
3 documentation and identifying Oversight Committee Members,  
4 the Claimant Trustee, and the Litigation Trustee. And a  
5 couple of days ago, Your Honor, the Committee identified the  
6 independent board member and the Litigation Trustee, and  
7 those people are acceptable to the Debtor and will be  
8 disclosed in the plan supplement.

9 The parties have also exchanged drafts of the Claimant  
10 Trust Agreement and the plan implementation documents, and  
11 the Debtor is cautiously optimistic that the parties will  
12 reach agreement on the form of these documents prior to  
13 filing the plan supplement.

14 Accordingly, Your Honor, the negotiation over these  
15 documents is happening exactly how it should be, and there is  
16 no reason for the Court to step in and give the Committee  
17 complete decision-making authority at this stage. If there  
18 is a dispute at confirmation, the Court can certainly weigh  
19 in. We understand that we need to try to work out the issues  
20 with the Committee, and I'm cautiously optimistic we can.

21 UBS and Daugherty have raised additional confirmation  
22 issues such as failure to satisfy the best interests of  
23 creditors test, violation of the absolutely priority rule,  
24 and the failure to demonstrate feasibility. None of these  
25 issues, Your Honor, have any merit, and, of course, are not

1 properly before the Court in connection with the disclosure  
2 statement hearing.

3 The liquidation analysis demonstrates that distributions  
4 in a Chapter 7 would be less than under a plan. If people  
5 want to flaunt that at confirmation, they can. As General  
6 Unsecured Creditors are not promised any amount of a  
7 distribution but will receive the net proceeds of the  
8 monetization of assets, the structure is, by definition,  
9 feasible. And Equity, while receiving contingent interests  
10 in the Trust, will not receive anything until creditors are  
11 paid a hundred percent, plus interest. So there is no  
12 violation of the absolutely priority rule.

13 However, as I mentioned, Your Honor, these are all  
14 confirmation issues that the parties are free to raise before  
15 Your Honor, who will have a full evidentiary and legal record  
16 to make those decisions at confirmation.

17 In conclusion, Your Honor, as I mentioned at the outset,  
18 all we are asking the Court to do today is to find that the  
19 disclosure statement contains adequate information within the  
20 meaning of Section 1125 of the Bankruptcy Code. We submit  
21 that the changes that have been made by the Debtor easily  
22 meet that standard. And while we surely hope to have the  
23 Committee and its members on board with the plan at  
24 confirmation, the lack of agreement at this stage is not  
25 fatal, and subject to voting, the plan can be confirmed

1 without the support of certain of the Committee members.

2 Similarly, Your Honor, none of the confirmation issues  
3 raised by the parties render the plan patently unconfirmable.  
4 They raise a variety of legal and factual issues that the  
5 Court will decide with full briefing and a full evidentiary  
6 record.

7 For these reasons, Your Honor, the Debtor requests that  
8 the Court grant the Debtor's motion and permit the Debtor to  
9 solicit votes in connection therewith.

10 I'm happy to answer any questions Your Honor may have.

11 THE COURT: All right. Well, I'm probably going to  
12 have a couple, but they may end up getting answered in the  
13 presentations, so I'll hold my questions for now.

14 We did see Mr. Baird on the screen for the PBGC.

15 MR. BAIRD: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. BAIRD: I apologize. I was trying to appear  
18 telephonically and I think I was muted by the Court and so  
19 I'm coming obviously through WebEx now. And I apologize for  
20 that technical snafu.

21 Debtor's counsel's representations are accurate. The  
22 PBGC's objection was resolved consensually by agreed-upon  
23 language, and I thank the Debtors for their hard work in  
24 getting us to that place.

25 Thank you, Your Honor.

1 THE COURT: All right. Thank you, Mr. Baird.

2 All right. Well, Mr. Clemente, I will turn to you or Ms.  
3 Reid next to hear what you have to say about the status of  
4 the disclosure statement.

5 MR. CLEMENTE: Yes. Thank you, Your Honor. Matt  
6 Clemente on behalf of the Committee.

7 I think Mr. Pomerantz accurately characterized the fact  
8 that we still have some issues with respect to the plan and  
9 we do believe that the plan as currently constructed is not  
10 capable of confirmation from a legal perspective, but perhaps  
11 equally, if not more importantly, from a practical  
12 perspective.

13 As I think about my comments to Your Honor, Your Honor  
14 may be asking me, what is it that I want, and maybe I'll  
15 start there. I think it's been clear from the outset of the  
16 case that this plan needs to ultimately reflect that which  
17 its key voting constituency finds acceptable. Your Honor,  
18 that will happen. The only question is when and how much  
19 delay and how much a waste of resources and time will be  
20 necessary. And that's how I'm framing the way that I'm  
21 approaching my comments.

22 The second thing I would offer, Your Honor, is Mr.  
23 Pomerantz's discussion to start the hearing is perfectly  
24 appropriate and one that I've heard many times in 99 out of a  
25 hundred other cases. But Your Honor, I think, as I've

1 consistently said to you from the beginning, I just don't see  
2 how in this particular case there can or, frankly, should be  
3 a plan that doesn't enjoy the support of the Committee and  
4 its members. And, again, frankly, Your Honor, I think it's  
5 foolhardy in trying to pursue such a plan.

6 We are not the only constituency objecting. We have  
7 objections and joinders from each member of the Committee, as  
8 well as other creditors in this case. In fact, I'm not sure  
9 there's any party that supports the current construct of the  
10 plan.

11 What we need, Your Honor, and what we've been clear about  
12 since the beginning of the case, is for the Debtor to  
13 understand the context of this case. I apologize for  
14 continuing to use that word, but I do think it's appropriate,  
15 because it isn't like a typical Chapter 11 case. The key  
16 constituency here are the General Unsecured Creditors, the  
17 overwhelming majority of whom are here because of litigation  
18 claims, Your Honor, and therefore the conduct of this Debtor.  
19 This cannot be overlooked, and particularly thinking about  
20 the release provisions of this plan.

21 As I have said, context is critical, and it is indeed  
22 critical here. Your Honor, the Debtor is not a maker of  
23 widgets who ran into industry headwinds. It didn't overlever  
24 itself with junk bonds. Nor are its insiders and key  
25 employees the victims of uncontrollable market forces or

1 other happenings beyond their control.

2 Your Honor, the Debtor fled into Bankruptcy Court to  
3 protect itself from litigation and judgments which found it  
4 liable for breaches of duty and fraudulent and other conduct  
5 over the course of a decade. Here, Your Honor, I think what  
6 is important is conduct and the actions taken by people, the  
7 very same people the Debtor is seeking to release under its  
8 proposed plan for no value and over the creditors' objection,  
9 people who this Court and other tribunals have found to be  
10 dishonest and lacking credibility, and the people whose  
11 conduct has resulted in the very litigation judgments and  
12 claims which precipitated this filing.

13 Your Honor, I submit in the context of this case, in  
14 particular with respect to the release provisions, we need to  
15 stop now and have the Debtor finally recognize and understand  
16 what its only constituency has said to it in this context.  
17 It needs and requires a new plan, in particular as it relates  
18 to the releases.

19 The release provision, Your Honor, even as modified in  
20 the most recently-filed plan -- and I'll be careful with my  
21 words here, Your Honor -- I believe is highly inappropriate,  
22 and frankly, is emblematic of a debtor that still doesn't get  
23 it.

24 Although I think one could argue that no release at all  
25 is appropriate in this context, the Committee is prepared to

1 consider an appropriately-drawn and narrow release covering  
2 certain parties. But providing a blanket but full release --  
3 and make no mistake, that is exactly what the plan does --  
4 for insiders and other similar persons who are the people  
5 whose conduct spawned the very claims that drove this  
6 bankruptcy and gave rise to the massive claims against the  
7 estate, frankly, is inappropriate, and I think one could say  
8 is offensive, in particular to the creditors whose claims  
9 remain unpaid. We are here because of their conduct, Your  
10 Honor, and a broad release as the default role is simply not  
11 appropriate.

12 With respect to the carve-outs and the modifications to  
13 the release that Mr. Pomerantz talked about and the  
14 justification of future cooperation on asset sales, it won't  
15 somehow otherwise revive an otherwise faulty release, Your  
16 Honor. The carve-outs for willful misconduct and gross  
17 negligence add nothing, and, more importantly, probably renew  
18 nothing, given public policy. But more importantly, perhaps,  
19 Your Honor, the Committee or Litigation Trustee shouldn't  
20 have to parse through language, release language, to  
21 determine whether something does or doesn't fall within the  
22 carve-out or outside of it, again, in the context of this  
23 case.

24 We live in a world of unintended consequences, but,  
25 perhaps, Your Honor, intended consequences when it comes to



1 the release, and we simply should not be confronted with the  
2 potential impact on claims and causes of action a release  
3 given today will have in the future.

4 In particular here, I know Mr. Pomerantz suggested that  
5 there is upside. I'd like to think I have upside in my world  
6 too, but in particular here, the Debtor's own projections  
7 show the General Unsecured Creditors are not likely to  
8 recover in full from the assets.

9 And therefore, the point is causes of action will provide  
10 a likely (inaudible) of recovery here, Your Honor. If in  
11 fact it turns out we need someone so badly in order to assist  
12 who will undoubtedly be a very capable Claim Trustee tasked  
13 with monetizing the assets in a value-maximizing way, we can  
14 offer the release at that point in time, Your Honor, as  
15 opposed to having to deal with that decision now and deal  
16 with the consequences of having a release thrust upon us now.

17 And frankly, Your Honor, I'm not sure what level of  
18 cooperation one could expect to get when the default is  
19 taking something away from somebody, which is exactly what  
20 the Debtors have proposed here.

21 Your Honor, let me be clear. What none of us want, and I  
22 assume Your Honor doesn't want, either, is us spending the  
23 next six weeks fighting the plan. To the contrary, the  
24 Committee wants to spend all of its resources and energies on  
25 confirming an appropriate plan. But at this juncture, it is

1 the Committee and its members view that it is a waste of time  
2 and resources to move forward with a plan that it doesn't  
3 support, and the Debtor needs to understand that message,  
4 Your Honor.

5 Let me offer a couple further comments, Your Honor. The  
6 Committee is not attempting to usurp or disenfranchise  
7 creditors. First, many of the key ones have spoken for  
8 themselves. They aren't supporting this plan and won't  
9 support this plan.

10 Second, the Committee has a fiduciary duty which it has  
11 and will continue to dispatch appropriately. One could more  
12 appropriately question the duty of this Debtor who insists on  
13 attempting to ram through, from what I can surmise, releases  
14 that enjoy no support, for the very employees who brought  
15 this case about in the first place and whose conduct has  
16 resulted in the claims of my constituents. Your Honor, I  
17 scratch my head as to what the actual explanation is for  
18 that, but it doesn't appear that there is one, and certainly  
19 not one that's acceptable to the Committee.

20 Your Honor, let me address why is this a disclosure  
21 statement issue. I don't think the Debtor should be given an  
22 opportunity to make its case at confirmation on this. As we  
23 laid out in our papers, we don't need to wait for a  
24 confirmation hearing to realize the Debtor can't satisfy the  
25 standard against which the releases will be judged, including

1 the paramount factor of Committee creditor support.

2 Additionally, Your Honor, the disclosure the Debtor wants  
3 to make that purports to cure the issue is woefully  
4 inadequate and skews it the wrong way. The default in this  
5 case is simply not that the releases are appropriate until  
6 proven otherwise. That is not the law. It's not the  
7 default. It may be practice, but this isn't the usual case.  
8 And Your Honor, I think it's just plain wrong.

9 Context, again, Your Honor, matters. This isn't the  
10 typical Chapter 11 case where a debtor is balancing multiple  
11 competing interests in a complicated capital structure,  
12 (inaudible) and things of that nature. We have a liquidation  
13 here, plain and simple. There aren't competing interest to  
14 balance. This is about maximizing the value of existing  
15 assets through an orderly liquidation after preserving and  
16 pursuing causes of action.

17 I don't understand the noble cause that the Debtor may  
18 think it's pursuing here, in particular with respect to the  
19 releases. There simply isn't the case as to why it should go  
20 forward at this time. From a legal perspective, we think  
21 it's patently unconfirmable, the way that the releases are  
22 restructure. And from a practical perspective, given the  
23 objections that have been filed, there simply isn't any point  
24 in moving forward with a plan that is not capable of  
25 confirmation at this point in time, Your Honor.

1           We did give the Debtor a couple of extra days to try and  
2     resolve our issues -- specifically, Your Honor, where we are  
3     with respect to the release. The conflict with related  
4     persons, Your Honor, which is contained in the release, must  
5     be removed. It's overly broad. It overly broadens the  
6     release by including former officers, directors, things of  
7     that nature. It just shouldn't belong there.

8           Second. Someone can be removed. Again, it's unintended  
9     consequences. We do believe, obviously, that our directors  
10    should enjoy a release, but the idea of (inaudible) part of  
11    the release, we just think that that unnecessarily broadens  
12    it.

13          And with respect to the officers and employees of the  
14    Debtor, Your Honor, you know the Committee's feelings on  
15    certain of the officers and employees of the Debtor. We  
16    think that it needs to be appropriately carved back to ensure  
17    that certain of those officers and employees are not covered.

18          So, Your Honor, that's where we are with respect to the  
19    releases. And we think that the construct of the release  
20    makes the plan patently unconfirmable, and practically not  
21    confirmable, given the objections that have been filed.

22          Similarly, Your Honor, with respect to the exculpation  
23    and injunction provision, I think if we remove the concept of  
24    a related person there, I think that appropriately narrows  
25    the exculpation and injunction.

1           Your Honor, with respect to the interest rate, I  
2   appreciate Mr. Pomerantz's concern that this is something  
3   that should be addressed at the confirmation hearing. I  
4   would just simply suggest to Your Honor that, given the  
5   (inaudible) decision and the District Court decision, I think  
6   it's entirely supportive of the position that the Committee  
7   has taken in terms of what an appropriate interest rate  
8   should be.

9           Your Honor, with respect to various provisions of the  
10   plan that the Debtor has carved back for itself, a consent  
11   right, Your Honor, we do endeavor to continue to work with  
12   the Debtor to resolve those particular types of issues as we  
13   move forward, and we have been able to make tremendous  
14   progress on that. We think there simply is, Your Honor, it  
15   is part of the underlying theme. The Committee has its duty  
16   to the constituency here, other creditors, and it's just  
17   confounding as to what it is that the Debtor continues to  
18   believe it needs to push forward with in terms of its duty or  
19   whom it's particularly protecting in those contexts, Your  
20   Honor.

21           So, with that, Your Honor, I'll conclude my remarks. I  
22   am happy to answer any questions Your Honor would have,  
23   particularly with respect to the releases. They render the  
24   plan patently unconfirmable, Your Honor, and frankly, from a  
25   practical perspective. We should just stop this now. The

1 Debtor should realize that the plan is going to look the way  
2 that its creditor constituency believes it should look, and  
3 should make those adjustments, instead of spending the next  
4 six weeks heading into a confirmation hearing where the  
5 result is inevitable.

6 Thank you, Your Honor.

7 THE COURT: All right. I know there are other  
8 parties who want to weigh in, but I'm going to interject  
9 right now. Actually, I'm going to go back to Mr. Pomerantz.

10 With regard to these releases -- and they are, I'll just  
11 be clear, Debtor releases, not third parties releasing third  
12 parties. But nevertheless, you know, I think there's an  
13 issue there of they would need to be fair and equitable, in  
14 the best interest of creditors, and in the paramount interest  
15 of creditors would be something the Court would focus on  
16 there. While I appreciate that you've tried to add more  
17 definition and carved people out, I tend to agree  
18 wholeheartedly with what Mr. Clemente said as far as context.  
19 This is not your normal case where this is the type of  
20 provision you see in many, many, many Chapter 11 plans. We  
21 don't have, for example, a lender and its professionals  
22 getting released from the Debtor because, for goodness sakes,  
23 they've made DIP loans and made all kinds of concessions. We  
24 certainly don't have anything close to the so-called grand  
25 compromise.

1           This does seem like a big deal to me, where we know there  
2           is going to be post-confirmation litigation. This provision  
3           to me seems to guarantee that, in every type of post-  
4           confirmation litigation that might be waged, there would be a  
5           Level 1 phase of that litigation, Oh, this is barred by the  
6           plan release.

7           So what is the -- and I understand you are going to tell  
8           me it's a confirmation objection, but it seems like a big  
9           deal that we ought to confront right now. So what is your  
10          response to that?

11                 MR. POMERANTZ: Your Honor, I do agree context is  
12           important. And we've heard from the beginning of this case  
13           from Mr. Clemente and others about how the employees and  
14           their involvement in Redeemer or their involvement in Acis  
15           are bad people, okay? But what have we seen in the last  
16           year? We've seen, and Mr. Seery will be prepared to testify  
17           at confirmation, that everything that the independent board  
18           has asked of these employees during the course of this case,  
19           they have come through, and we are where we are in part  
20           because of the dedication and hard work. Okay?

21           Second point, Your Honor. The Committee on January 9th  
22           had the ability to pursue claims against insiders,  
23           affiliates, employees. I know Mr. Clemente will say that we  
24           still haven't produced emails, but the fact of the matter is  
25           they have received a substantial amount of discovery. We are

1 nine months after that. And the Committee cannot identify  
2 one single claim against any of these employees. Whether  
3 it's because of the animus of the Committee members, whether  
4 it's because of the desire to hold them hostage, the bottom  
5 line is there is nothing in the record of these cases that  
6 the employees who have worked hard should not get a release.

7 But it's more important than that, Your Honor. Mr. Seery  
8 will testify at the confirmation that it is critical to  
9 obtain the support of certain key employees, not only to  
10 monetize assets but to deal with the objections to claims.  
11 The objections to the claims filed by UBS, which, as Your  
12 Honor has heard, the Debtor doesn't believe are valid. The  
13 objection to the claims of HarbourVest. So to argue that the  
14 cooperation requirement that is now part of the plan and its  
15 consideration should be overlooked and is irrelevant, this is  
16 not the case, Your Honor.

17 I talked to you about objections to claims. Mr. Clemente  
18 stands up before Your Honor and talks about how the Committee  
19 members and other parties are not supporting this plan.  
20 Let's look at that a little further. First of all, the  
21 Committee has Meta-e on its Committee. Meta-e, I suspect,  
22 now that it's getting 85 percent of its distribution, I  
23 suspect they will support the plan.

24 UBS, Your Honor. UBS does not have a claim, the Debtor  
25 believes. So the views of a disputed creditor.



1 We acknowledge Acis and Redeemer have claims. We  
2 acknowledge maybe they will object to the plan. But let's  
3 look who else objected.

4 HarbourVest. The Debtor -- the Court has not heard a  
5 full hearing on the Debtor's views on the HarbourVest claim.  
6 That will come preliminarily in the 3018 motion that  
7 HarbourVest filed. We don't believe HarbourVest has a claim.

8 Patrick Daugherty. We have objected to their claim as  
9 well, and there'll be a 3018.

10 So this whole concept of the creditor body at large  
11 objected to the claims, if you really strip through it, you  
12 have several disputed creditors who have objected to the  
13 claims. You have two legitimate creditors in Acis and  
14 Redeemer, which we acknowledge at this point have not  
15 accepted. But you also have a year of a record where Mr.  
16 Clemente, despite all the effort and time that Sidley and FTI  
17 and the Committee have put into this case, have not  
18 identified a solitary issue.

19 So, Your Honor, we hope to be able to resolve this issue  
20 prior to confirmation. We don't think that Mr. Clemente is  
21 right that this is legally unconfirmable. I think Mr.  
22 Clemente has acknowledged it's an issue of sufficiency of the  
23 consideration. And we respect the Committee's view to say  
24 that the Debtor will not meet its burden. But at this stage,  
25 based upon a series of unfounded allegations and ephemeral

1 allegations that just because they were involved in some  
2 prepetition litigation, ignores the right of this independent  
3 board, ignores the services that they have provided, and is  
4 just not something that the Court needs to determine today,  
5 absent a full evidentiary hearing on these issues.

6 I realize I may have been testifying from the podium.  
7 That's not my intent. But the right place to deal with this  
8 issue, if it's still an issue at confirmation, is with a full  
9 evidentiary record so Your Honor can make the decisions not  
10 based upon innuendo, allegations, and just what the history  
11 of Highland is, but really on what the facts are and whether  
12 the facts justify a release.

13 THE COURT: Okay. Let me ask this. It sounds like  
14 what we're talking about is a group of employees that  
15 Highland, you know, the board of Strand, Mr. Seery, feel like  
16 have been invaluable and will continue to be invaluable. Why  
17 not just list the employees who would be the subject of the  
18 release, instead of kind of working backwards and granting a  
19 release that's somewhat broad and then saying, Oh, but we're  
20 carving out Dondero, Okada, you know, HCLOF. If what we're  
21 really talking about essentially is some key employees, why  
22 not just list them?

23 MR. POMERANTZ: Well, Your Honor, it's not only the  
24 key employees. It's all employees. I don't think I've ever  
25 seen a plan that has identified every employee that would get

1 a release. That's something we could do. We are mindful of  
2 privacy issues from individuals, and individuals tend not to  
3 like to see their names in pleadings.

4 I think it's pretty clear who's getting released here.  
5 It's these employees. We've had sufficient carve-outs. If  
6 Mr. Clemente doesn't like the language we thought was pretty  
7 broad to make sure there is no -- there is no potential of  
8 having Mr. Okada, Mr. Dondero, or any of their entities,  
9 we're happy to work on an expanded inclusion. If Your Honor  
10 requires we -- us to identify the names, we can. We just  
11 don't think it's really appropriate to have a list of 50, 60,  
12 whoever the employees are, in a public document like that.

13 THE COURT: All right.

14 MR. CLEMENTE: Your Honor, if I might, and I can be  
15 very brief. I do appreciate Mr. Pomerantz's impassioned  
16 response. Let me say just a couple things in response.

17 I have never cast aspersions on any particular employee.  
18 That's just what the record has reflected from prior  
19 proceedings. And that, Your Honor, is what the context is,  
20 which is why it is different.

21 Your Honor has accurately pinpointed the issue. As I've  
22 used before, Your Honor, this is a Byzantine empire. We  
23 don't know what the release is going to be when we think  
24 about claims that will be brought by the Litigation Trust  
25 into the future. And so the idea that you have a broad

1 release that then you try and carve back, frankly, is  
2 unworkable in this particular context.

3 With respect to Mr. Pomerantz, again, pointing the finger  
4 at me and the Committee, I'm not sure why the paradigm is  
5 that the releases again in this context are appropriate and  
6 it was up to the Committee to present claims against these  
7 employees. That's never been the construct of this case,  
8 Your Honor. It's always been one where the Committee has  
9 been very cost-conscious. They believe the appropriate way  
10 to ultimately do it is in the context of the Litigation  
11 Trust. I don't see why that decision should be taken away  
12 from them in the context of this case and with respect to  
13 this Debtor.

14 And just one final point, Your Honor. This one I  
15 actually do find offensive, with Mr. Pomerantz referring to  
16 the conduct of individual Committee members. I can  
17 absolutely assure you that every single one of these  
18 Committee members will continue to act in accordance with  
19 their fiduciary duties, even if that may mean it may cause  
20 them to make a decision that Mr. Pomerantz thinks that they  
21 shouldn't make.

22 So let me be very clear on that. And that one, Your  
23 Honor, I do take umbrage with.

24 Your Honor, I'm happy to answer any questions, but I did  
25 want to make those comments in response to what Mr. Pomerantz

1 had to say.

2 THE COURT: Okay. Let me turn to a different topic.  
3 There had been an objection regarding the Committee's consent  
4 rights over the Claimant Trust Agreement, the initial members  
5 of the Oversight Board, employees retained, et cetera, et  
6 cetera. I'm not sure where the Committee is right now on  
7 that. I understand the Debtor made some concessions. And,  
8 well, I guess what I understood was you proposed someone to  
9 be the Liquidating Trustee. They agreed. You proposed  
10 someone to be on the Oversight Board. They agreed. Where  
11 are we on that objection?

12 MR. CLEMENTE: Correct, Your Honor. I believe  
13 there's two points that are still salient there. One is this  
14 leads back, perhaps, to the release issue, but the idea that  
15 the Committee will be told who the retained employees are.  
16 The Committee believes that that is a decision that should be  
17 made by them through the Claimant Trust, after confirmation  
18 and in connection therewith. Which remains salient, Your  
19 Honor, and maybe more so: The Debtor shouldn't be able to  
20 veto it. That's the problem with that. With respect to the  
21 document, Your Honor, --

22 THE COURT: Let me stop you there. Is the concern  
23 there -- okay. One view might be you're micromanaging saying  
24 who they retain, but I think the concern there is they would  
25 be entitled to bonuses and maybe some significant

1 compensation if retained that would -- you know, I don't know  
2 if their contracts would be assumed or those obligations  
3 would somehow be assumed. Is that the issue there, that  
4 you're concerned about --

5 MR. CLEMENTE: That's correct, Your Honor.

6 THE COURT: -- lucrative compensation, perhaps?

7 MR. CLEMENTE: The identity of those individuals and  
8 what function they're going to perform. Again,  
9 micromanaging, Your Honor, that point very well taken. But  
10 again, I think here, in particular, given the atmosphere of  
11 this case, that it's important for the Committee to be  
12 participating in that process and not to have the Debtor say,  
13 This is how it's going to be. If you don't like it, vote  
14 against the plan.

15 THE COURT: Okay.

16 MR. POMERANTZ: Your Honor, if I may address that  
17 point, because I think it reflects a fundamental  
18 misunderstanding of the Committee, which we tried to address  
19 in our reply.

20 The issue of retained employees -- let me take a step  
21 back. The Debtor has a bonus program that has been in place  
22 for years. Bonus payments are staggered, and will be due at  
23 various times. The next bonus payment will come due at the  
24 end of February.

25 Under the plan, only if an employee is actually employed

1 on the date will they be entitled to a bonus. It doesn't  
2 matter if they're terminated with or without cause. So the  
3 key date for determining whether these employees are entitled  
4 to a bonus is February 28 of next year. The plan provides  
5 that these retained employees will have these contingent  
6 claims, contingent bonus claims, which will vest essentially  
7 if they're employed on February 28th, that they be retained  
8 and those claims, contingent claims, will exist after the  
9 effective date.

10 The Claimant Trustee, whoever that person is, whether  
11 it's Mr. Seery or otherwise, and the Oversight Committee will  
12 have plenty of time between the time of the effective date  
13 and February 28th to address those issues.

14 It's patently inappropriate for the Committee to, before  
15 confirmation, be micromanaging -- your word, Your Honor --  
16 the Debtor's determination. And in fact, it doesn't matter.  
17 This concern that claims will arise and they'll be stuck with  
18 millions of dollars of claims before the post-effective date  
19 structure can go in is just wrong. So, Your Honor, we don't  
20 think there needs to be any change. It'll be the Claimant  
21 Trustee, subject to the oversight of the Oversight Committee.

22 THE COURT: Okay. Let me think through this. How  
23 are you going to deal with their voting rights? Because now  
24 they're in Class 7 of the plan, right? The bonus --

25 MR. POMERANTZ: I think those claims, Your Honor,

1 are unimpaired. And they're reinstating those, so they're  
2 presumed to accept the plan. They're not an impaired --  
3 they're not going to be an impaired --

4 THE COURT: Okay.

5 MR. POMERANTZ: -- consenting class that's going to  
6 support confirmation. Essentially, it's just a ride-through.

7 THE COURT: Okay.

8 MR. POMERANTZ: I mean, perhaps we shouldn't have  
9 even had a class. We could have had it ride through. We  
10 wanted to be transparent. We wanted to identify those.

11 But again, we tried to address it in the reply, and I  
12 hope my comments today to Your Honor and to Mr. Clemente  
13 makes the Committee realize that there really is no  
14 substantive issue here. There is no disagreement. The  
15 Claimant Trustee and the Oversight Committee will be able to  
16 make a decision before any of those claims vest.

17 THE COURT: All right. Well, let me go through the  
18 other what I'll call consent issues that were raised in the  
19 objection. Are we down to just that one, Mr. Clemente, or  
20 were there other issues that remain?

21 MR. CLEMENTE: Your Honor, I believe on the consent  
22 points we are down to just that issue. Again, you know, we  
23 understand that we have to continue to work through the  
24 documentation with Mr. Pomerantz. You know, we will endeavor  
25 to do that.



1 THE COURT: All right. So, all of these items, such  
2 as who's going to be on the Oversight Board, who's going to  
3 be the Litigation Trustee, who's going to be the Claimant  
4 Trustee, compensation, these are all going to be put in the  
5 plan supplement, and the Committee is okay with that plan  
6 supplement being filed seven days before the voting deadline?

7 MR. CLEMENTE: Yes, Your Honor. We're okay with  
8 that, with that structure.

9 And let me be clear. We have some wood to chop with  
10 respect to that, some of the things that you raised. But  
11 again, I think the expectation is we should be able to  
12 negotiate through all of those things so that we don't have  
13 to bring them before Your Honor.

14 THE COURT: Okay. You know, I always like to defer  
15 to the economic stakeholders, and yet I just have to ask, why  
16 delay? Why delay disclosure of all of these items until a  
17 plan supplement seven days before the voting deadline? I  
18 don't know if other creditors are going to raise this or not.  
19 But as we have said a couple of times, context matters. This  
20 is really not your typical case.

21 I see the plan supplement feature in just about every  
22 single complex Chapter 11 case for 20 years. But it seems to  
23 me that that feature evolved because so often the debtor is  
24 under the gun, right? You know, maybe they've got milestones  
25 or deadlines in their DIP order that you've got to get a plan

1 on file by X date or you default under the DIP, or some other  
2 deadline is looming. And so I think that's why that whole  
3 plan supplement concept first evolved.

4 But we don't have that here. So what is -- I know it's  
5 rare for a bankruptcy judge to say, What is the rush? We  
6 like you to hurry things along, typically. But in this  
7 context, I wonder, why can't we just have it all in the  
8 document that goes out? I guess that goes to Mr. Pomerantz.

9 MR. POMERANTZ: Sure, Your Honor. Look, we have  
10 endeavored to try to make as much progress on these issues as  
11 possible. We started exchanging documents regarding the  
12 Claimant Trust Agreement and the corporate documents. I  
13 believe Mr. Clemente's firm prepared the initial draft of the  
14 Claimant Trust Agreement a few weeks ago.

15 Obviously, there's been a lot going on in this case.  
16 There has been a rush to confirmation, I think primarily  
17 because people recognize the substantial burn rate in this  
18 case.

19 There is nothing sacrosanct about having the confirmation  
20 hearing on December 3rd, as originally scheduled. We  
21 actually, in any event, asked for an extension, given that  
22 this hearing came after. There is nothing that would prevent  
23 us from waiting two, three weeks, other than the substantial  
24 burn rate.

25 We do think that a week in advance is sufficient for

1 parties to review it. All the objectors are represented by  
2 very sophisticated, very knowledgeable counsel.

3 But if Your Honor wanted to provide more time to review  
4 the information in the plan supplement and either delay  
5 solicitation, which I would hope neither, perhaps give more  
6 time between the plan supplement and the voting and the  
7 objection deadline, which then would move the confirmation  
8 hearing to sometime to mid, late December, assuming we don't  
9 get in the middle of the holidays, we wouldn't have a  
10 conceptual problem.

11 But we do recognize, and the independent board has  
12 recognized and the Committee has recognized, that there is a  
13 substantial burn rate to this case, and the quicker we can  
14 get to confirmation and effective date, the quicker we could  
15 reduce that.

16 But again, subject to Mr. Clemente, because he has been  
17 the one, and his Committee, been lighting the fire under the  
18 Debtor to make sure we move. If they're okay with moving it,  
19 you know, a couple of weeks or so to try to get these things  
20 done, we would have no objection.

21 THE COURT: Okay.

22 MR. CLEMENTE: Perhaps, Your Honor -- this is Matt  
23 Clemente. Perhaps, you know, just looking at the proposed  
24 schedule -- so I apologize for looking at my computer screen  
25 here -- but is it the concept of the seven days, Your Honor?

1 Because we could probably move the plan supplement date just  
2 up to provide more time.

3 I think the reality is, Your Honor, is we do have some  
4 work to do on some of those documents. And so, first of all,  
5 I don't think the disclosure statement should be approved  
6 today, so it could be, you know, a nullity, meaning we may  
7 have more time to be discussing those items anyway.

8 But if Your Honor was otherwise inclined -- which, again,  
9 I would urge Your Honor not to -- the current plan supplement  
10 deadline, I think, Mr. Pomerantz, will be November 23rd. And  
11 then maybe we could address Your Honor by just backing that  
12 up by a week or ten days to allow the materials to be put out  
13 before the November 23rd date.

14 THE COURT: All right.

15 MR. KATHMAN: Your Honor, Jason Kathman. May I be  
16 heard on this issue? Because I think it directly affects my  
17 client, as well as HarbourVest and UBS. I suspect they may  
18 want to speak up on this issue as well.

19 THE COURT: All right. Well, I do need to roll to  
20 the other objectors, so I guess this is a good time. Go  
21 ahead, Mr. Kathman.

22 MR. KATHMAN: Your Honor, I'll start with this  
23 specific issue. We agree with Your Honor that the plan  
24 supplement, or at least the disclosure and the Liquidating  
25 Trust Agreement, should be provided in advance, further

1 advance than the seven days that's currently being provided.  
2 And the reason is -- I agree with Mr. Pomerantz, generally  
3 seven days is enough. But in this particular plan, the way  
4 that creditors are being paid -- specifically, Mr. Pomerantz  
5 referenced that there are three large creditors, and that's  
6 the first, the largest creditor, potentially, UBS; the third  
7 largest creditor, HarbourVest; and my client, the fourth  
8 largest creditor in this case, are all what the plan calls  
9 disputed claims. And the plan provides that those --

10 THE COURT: Let me stop you right there. Does Mr.  
11 Daugherty have at least a portion of his claim not disputed?  
12 I lose track of the history of litigation there. I know he's  
13 asserted a, what, a \$30 million-plus proof of claim, but is  
14 there some chunk of that that is beyond dispute?

15 MR. KATHMAN: Correct, Your Honor. You have a very  
16 good memory. There's approximately \$3.7 million that the  
17 Debtor does not dispute. And they answer that in their  
18 adversary proceeding, and even in their supplemental  
19 materials they filed last night in a footnote.

20 Their calculations on proposals of what recoveries will  
21 be is based on assumption of Mr. Daugherty's claim being \$3.7  
22 million.

23 The filed claim of record is \$37 million currently, Your  
24 Honor, and then we filed a request to amend the claim to make  
25 it \$41 million on Friday, along with a 45-page brief on our

1 3018 motion that goes into the underlying bases for that  
2 claim, Your Honor, which I'll just say, in brief summary, is  
3 really what the Debtor's *modus operandi* has been. Small  
4 judgment to Mr. -- to Daugherty, and then they fight it like  
5 hell in multiple jurisdictions, and the small number becomes  
6 a very big number.

7 We are currently litigating that issue in Delaware.  
8 We're in the third day of a trial in Delaware in a case where  
9 the Delaware judge actually found the crime fraud exception  
10 to attorney-client privilege applied and required the Debtor  
11 to disclose attorney-client-privileged emails, emails that  
12 actually go to some of the issues that Mr. Clemente and Mr.  
13 Pomerantz were talking about, about these releases and  
14 individuals, Your Honor.

15 And I don't want to get off of kind of what we're talking  
16 about here, which is the disclosure of this Liquidating Trust  
17 Agreement.

18 Your Honor, the plan provides that these quote/unquote  
19 disputed claims are going to be paid in connection or  
20 consistent with the Liquidating Trust Agreement. And so, as  
21 Mr. Clemente said throughout this case, context is important.  
22 In this case, that Liquidating Trust Agreement is dictating  
23 how the first, third, and fourth largest claims are going to  
24 be paid in this case. And if that's not being disclosed  
25 until a week before confirmation, Your Honor, I think the

1 disclosure statement does lack adequate information, because  
2 we have very, very large claims here. UBS, who has been a  
3 major player in this case; HarbourVest, who has a potentially  
4 very large claim; and my client that has a very large claim,  
5 whose claims at this point in the disclosure statement are  
6 unclear how they're being treated because the plan says it's  
7 going to be treated consistent with a trust agreement and we  
8 don't know what the trust agreement says.

9 And so, Your Honor, I have some other objections that  
10 I'll raise later. I'll let the other parties talk about this  
11 issue so that we're not mincing -- mixing issues. But I  
12 wanted to speak up specifically on this issue because we --  
13 and HarbourVest has raised this issue in their objection. We  
14 think that that Claimant Trust Agreement should be provided  
15 well in advance of seven days, on the facts in this case, at  
16 least.

17 THE COURT: All right. I'll hear the rest of your  
18 objections at this time. Go ahead.

19 MR. KATHMAN: Thank you, Your Honor. I'll be very  
20 brief with the other objections.

21 The first one being, we did object that we think the plan  
22 unfairly gerrymanders the claim, really, for the convenience  
23 class. A million dollars. I understand that that's been  
24 negotiated with the Committee. But still, a million dollars  
25 is an extremely large convenience class, and I don't think

1 that's consistent with what 1122 was indicated to address.

2 When you add onto that, Your Honor, that the majority of  
3 the claimants in the claimant or in the convenience class,  
4 quote/unquote, is -- are the law firms, I mean, the  
5 overwhelming majority of the claims in the convenience class  
6 are the Debtor's law firms that are unpaid. And so what  
7 essentially we have is the Debtor has created this class that  
8 they call a quote/unquote convenience class for their  
9 lawyers, and then they're negotiating a 15 percent discount  
10 for their lawyers to be paid. And again, these law firms are  
11 the law firms that the Debtor has been using for years and  
12 years to really promote the litigation that Your Honor is  
13 familiar with.

14 Our second issue, Your Honor, really goes to the absolute  
15 priority rule argument that we raise. The plan provides that  
16 the limited partners are going to receive these quote/unquote  
17 contingent interests. And I understand the Debtor's response  
18 to that, and their argument is, hey, if the Debtor doesn't  
19 end up being solvent, then those contingent interests never  
20 vest.

21 Nevertheless, the plan expressly provides -- and I'll  
22 read the language from the plan, Your Honor, and this is the  
23 same language for both Class 9 and Class 10 now. "In full  
24 satisfaction, settlement, discharge, and release of, and in  
25 exchange for such claim, they shall receive their contingent



1 claim interest."

2 So we have a plan of reorganization, Your Honor, that's  
3 being proposed that facially in the disclosure statement says  
4 they're going to pay creditors 91 cents on the dollars, and  
5 yet their plan is getting these contingent interests to  
6 equity holders. My argument is it doesn't matter whether  
7 those contingent interests ever vest or not. They are  
8 getting a legal right. They are getting a contingent  
9 interest for their limited partnership interest. Under the  
10 Bankruptcy Code, that's just not permitted.

11 Your Honor, the third argument is, in addition to what I  
12 had earlier, is just we don't believe there's adequate  
13 information over the Class 5 causes of action. There's  
14 approximately \$94 million worth of Chapter 5 causes of action  
15 disclosed in the Statement of Financial Affairs. The  
16 Debtor's response was, hey, the -- that's the Creditors'  
17 Committee's job, is to go investigate those, and they have  
18 full duty to go investigate those and determine what claims  
19 and causes of action there are.

20 I don't know if they think that that kind of alleviates  
21 them of their obligation or requirement to investigate those  
22 or to make some sort of disclosure, but \$94 million is a  
23 pretty substantial asset. And if we think back to what Mr.  
24 Clemente was saying, that causes of action is going to be a  
25 substantial source of recovery for creditors in this case, I

1 believe that in, I think, *Metrocraft* and the other cases the  
2 talked about sufficient adequate information have talked  
3 about disclosure of what the value of the Chapter 5 cause of  
4 action should be disclosed in the disclosure statement, and I  
5 don't believe the Debtor can just get off by saying, hey,  
6 that's the Creditors' Committee's job, is to go investigate  
7 the -- investigate that and give us some information.  
8 Because it doesn't have that information, Your Honor, and  
9 because we believe that the trust agreement should be  
10 disclosed in this case, we'd ask that the Court deny approval  
11 of the disclosure statement.

12 THE COURT: Let me follow up. Potentially \$90  
13 million of Chapter 5 avoidance actions. Did you go, what, to  
14 the Statement of Financial Affairs and look at any payments  
15 made in the 90 days before, or where did you come up with  
16 that?

17 MR. KATHMAN: Yes. Specifically, Your Honor, the  
18 Statement of Financial Affairs #4 discloses \$36 million to  
19 insiders, Chapter 5 causes of action to insiders. In  
20 addition, there is approximately \$30-some-odd million of  
21 transfers made to insiders disclosed on #13 of the Statement  
22 of Financial Affairs. And then in addition to that, within  
23 the 90 days, entities that you can pick out that the Court is  
24 familiar, Highland CLO Funding, various different insiders  
25 that are definitely insiders of the Debtor, the additional

1 sum of that \$90 million disclosed in the Statement of  
2 Financial Affairs.

3 THE COURT: Okay. So you're saying, to avoid being  
4 barred, estopped from potential avoidance actions, they need  
5 to disclose these? You know, there may be like, you know,  
6 defenses and whatnot, but they need to be disclosed to avoid  
7 estoppel, or what?

8 MR. KATHMAN: No, Your Honor. I wasn't even going  
9 the whole *United Operating* preserve-the-claim-or-cause-of-  
10 action route. As a pure matter of adequate information,  
11 *Metrocraft* and the other cases that talked about the factors  
12 that a court should determine in determining whether a  
13 disclosure statement has adequate information, one of the  
14 factors that each of those courts say that should be  
15 disclosed in any disclosure statement --

16 THE COURT: Okay.

17 MR. KATHMAN: -- is what is the value and potential  
18 recovery on Chapter 5 causes of action? There's none of that  
19 in the disclosure statement.

20 THE COURT: All right. Thank you.

21 Mr. Pomerantz, I'm going to turn back to you on the  
22 convenience --

23 MR. POMERANTZ: Sure.

24 THE COURT: -- class issue and the alleged improper  
25 classification.

1       So, okay, first, hypothetically, we could be in a  
2       situation, right, where this is your impaired accepting  
3       class, the convenience class, right? If -- if the --

4               MR. POMERANTZ: That is correct. It could -- it  
5       could be.

6               THE COURT: All right. Is it law firms, mostly just  
7       former law firms, or do we have small little vendors that  
8       we're trying not to get trapped up in this process? Not --

9               MR. POMERANTZ: Well, let's take a --

10              THE COURT: I mean, relatively speaking. I guess  
11       you could say a law firm with a million-dollar claim is, you  
12       know, a small little vendor in the context of this case. But  
13       let's be real. What are we talking about in that class?

14              MR. POMERANTZ: Sure. So, let's take a step back.  
15       I think you heard from Mr. Clemente that the Committee does  
16       not have any objections to the classification. And the  
17       reason for that is the Committee in this case not only  
18       includes large litigation claims but also includes Meta-e,  
19       which is a creditor, with a claim less than a million  
20       dollars. These issues, the convenience class, the identity,  
21       the thresholds, were negotiated with the Committee, Meta-e,  
22       acting in a fiduciary capacity. And to the extent Mr.  
23       Clemente took my prior comments to say that Committee members  
24       weren't acting in a fiduciary capacity, I did not mean to say  
25       that at all.

1 But this was a negotiation with the quintessential  
2 convenience class creditor in this case.

3 Now, Your Honor, we don't dispute that many creditors in  
4 this class are law firms. That may be true. They are law  
5 firms that were stiffed by the Debtor. So the concept that  
6 basically they're the Debtor's friends because the Debtor  
7 filed bankruptcy owing millions of dollars to law firms, I  
8 know my law firm, when we get caught up in a bankruptcy case,  
9 we aren't particularly thrilled with the debtor (inaudible)  
10 size of the receivable. So I think the premise is incorrect,  
11 that basically just because these are debtor law firms.

12 They are service providers. They are different from the  
13 other creditors, the litigation creditors. We think there's  
14 a compelling reason in this case to treat small creditors and  
15 give them the opportunity to accept a discount as opposed to  
16 being rolled up with all the litigation creditors.

17 And Your Honor, importantly, the evidence will show, when  
18 Your Honor has a full evidentiary hearing and Mr. Seery  
19 testifies, that the reason for the separate classification  
20 had nothing to do with gerrymandering but with the process I  
21 described. And under Fifth Circuit law, that is acceptable.

22 THE COURT: All right. Well, let me hear from UBS  
23 next.

24 MR. POMERANTZ: Your Honor, do you want me to  
25 address Mr. Daugherty's Class 5, the avoidance action claim,

1 --

2 THE COURT: Yes.

3 MR. POMERANTZ: -- you want me to do it now, or do  
4 you want me to do it later?

5 THE COURT: Yes, go ahead, if you would, now.

6 MR. POMERANTZ: Okay. So, Your Honor, I've done a  
7 lot of Chapter 11 work. I'm sure Mr. Kathman does as well.  
8 I can't recall a case where the specific valuation of Chapter  
9 5 causes of action are included in the disclosure statement.  
10 And the reason for that is that work is typically done post-  
11 confirmation. And, again, we did mention that the Committee  
12 is responsible for looking into the insider actions. That is  
13 the case. I note that even under our release, avoidance  
14 actions are limited.

15 But I think, to use Mr. Clemente's term, context matters.  
16 Okay? Why, in a case like this, where assets are being  
17 transferred to a Claimant Trust which is going to monetize  
18 the assets, why is it relevant whether avoidance actions are  
19 worth \$20 million, \$30 million, or zero? This is essentially  
20 putting the assets and the causes of action in the Claimant  
21 Trust.

22 In some cases, avoidance actions amount may be relevant.  
23 I find it hard to believe that in this context, in this case,  
24 that a creditor sitting there will make a determination to  
25 support the plan or not support the plan because avoidance

1 actions may have some value that brings the creditors' claims  
2 up to \$.94 or not.

3 So, I think in the context of this case, the specific  
4 identity of the avoidance actions is not relevant. The  
5 Committee is working on language on retained causes of action  
6 that would be included in the plan supplement to deal with  
7 the estoppel issue.

8 So, Your Honor, I just think this issue is a red herring  
9 in this case, for the reasons stated.

10 THE COURT: All right. Thank you. UBS, I'll hear  
11 your objection.

12 MS. POSIN: Thank you, Your Honor. Kim Posin of  
13 Latham & Watkins, counsel for UBS.

14 Good morning, Your Honor. We -- UBS filed its objection  
15 to the Debtor's disclosure statement on October 20, pursuant  
16 to which it raised certain confirmation objections as well as  
17 disclosure objections, and we also joined in the Committee's  
18 separate objection.

19 I'm going to try very hard to try not to duplicate the  
20 argument that you've already heard. We do agree with many if  
21 not most or all of the arguments that Mr. Clemente and Mr.  
22 Kathman have already made this morning.

23 We have also reviewed the amended plan and disclosure  
24 statement, as well as the omnibus reply brief that the Debtor  
25 filed late on Sunday, as well as the additional disclosures

1 that they filed -- or, they filed yesterday.

2 I did want to make one point first, Your Honor, and that  
3 is with respect to the assertion the Debtor made this  
4 morning, and also in Footnote 4 of its reply brief, that UBS  
5 was not authorized to file its objection at one day after the  
6 original due date. I wanted to assure the Court that UBS  
7 takes the Court's deadlines very seriously, and was, in fact,  
8 justified in filing its objections when it did based on an  
9 email that Mr. Pomerantz sent to Mr. Clemente on October  
10 19th, which I have reviewed and will be happy to provide to  
11 the Court, in which Mr. Pomerantz explicitly confirmed an  
12 agreement to extend the objection deadline for the Committee  
13 and each of its members to October 20. And we did, in fact,  
14 file an objection within that time frame.

15 Nevertheless, we were pleased to see that the Debtor had  
16 included additional disclosures in its Sunday and Monday  
17 filings that addressed certain but not all of UBS's  
18 objections.

19 From a confirmation perspective, we have many of the same  
20 arguments that have already been raised this morning. We  
21 believe there are still four reasons why the plan is patently  
22 unconfirmable, and other -- why it would be futile to allow  
23 the current disclosure statement to be sent out for  
24 solicitation to creditors.

25 First, as Mr. Clemente has already addressed, the plan,



1 we believe, continues to contain improper release and  
2 exculpation provisions.

3 Second, we also agree that the plan potentially unfairly  
4 discriminates against certain of the Debtor's General  
5 Unsecured Creditors by placing the General Unsecured  
6 Creditors into multiple different classes and providing each  
7 of those classes with a different percentage recovery. And  
8 as Mr. Clemente and the other Committee members have made  
9 clear in their filings, none of the members currently intend,  
10 to my knowledge, to vote in favor of the plan as it's  
11 currently drafted.

12 Third, there continue to be serious flaws from our  
13 perspective in the Debtor's liquidation analysis. They make  
14 certain assumptions that are not -- that appear to have no  
15 real basis. They're not explained at all. And that, we  
16 believe, prevents a finding that this plan satisfies the best  
17 interests test as well.

18 And, finally, we believe the disclosure statement does  
19 not contain sufficient information or evidence to show that  
20 the plan is feasible and that it was filed in good faith.  
21 Currently, as drafted, there are a number of payments that  
22 will be going out to the various creditors, and including  
23 administrative claimants, on or around the effective date.  
24 It does not appear from the information that we have seen  
25 there will be sufficient funding to pay for those claims and

1 those amounts in the time frame required by the plan.

2 Your Honor, each of these issues are addressed in more  
3 detail in our objections, and certain of them have clearly  
4 been already addressed by certain of the parties today and I  
5 won't belabor them further now.

6 To the extent the Court ultimately determines that these  
7 are all confirmation issues and more properly addressed at a  
8 confirmation hearing, UBS, of course, reserves all of its  
9 rights to assert those objections at that time.

10 However, as Mr. Kathman has already pointed out, the  
11 disclosure statement is still devoid of any information with  
12 respect to the Debtor's disputed claims reserve. As this  
13 Court is well aware, UBS has filed a large claim against it  
14 as we speak, and the Debtor has objected to that claim, which  
15 means that UBS now holds one of those disputed claims. For  
16 claims like UBS's and HarbourVest's and Mr. Daugherty's that  
17 have not yet been allowed, the plan simply provides for the  
18 creation of a disputed claims reserve, but that's it. It  
19 doesn't provide any additional information regarding the  
20 reserve.

21 For example, there are no details as to what assets the  
22 Debtor intends to use to fund that reserve. Right now, there  
23 is relatively little cash at the Debtor, and it's mostly made  
24 up of assets, some of which are relatively illiquid. And  
25 there is no discussion as to whether that disputed claims

1 reserve will be made up of cash or assets, or, if assets,  
2 whether those will be illiquid assets or assets that are  
3 capable of being liquidated at some point in time and capable  
4 of an estimated value.

5       There is no information about how the Debtor plans to  
6 deal with -- to reserve beneficial interests in a trust, the  
7 Claimant Trust, for disputed claims. There is no information  
8 about how the Debtor intends to determine the amount to be  
9 reserved in that disputed claims reserve on account of  
10 disputed claims on the effective date, which, of course,  
11 could affect recovery of the other claimants. There is no  
12 information about whether and when the Debtor intends to seek  
13 to estimate disputed claims for reserve purposes, to allow  
14 distributions to be made to other creditors on or around the  
15 effective date.

16       And finally, there's no information about how  
17 distributions made by the Claimant Trust will be treated vis-  
18 à-vis the claims that remain disputed, contingent, and/or  
19 unliquidated as of the effective date, to assure that all  
20 claims in the same class will ultimately receive the same pro  
21 rata treatment.

22       Not only does this lack of detail prevent a finding, from  
23 our perspective, that the plan is feasible on its face, but  
24 the bigger issue from our perspective is, without an  
25 understanding with respect to the mechanics of the reserve,

1 it will be very difficult for any creditor to really  
2 understand and ascertain when they are likely to receive a  
3 recovery, and ultimately, the likely recovery that they will  
4 receive.

5 In response to these objections, which we did raise in  
6 the objection we filed on October 20, the Debtor notes in its  
7 reply brief, and also Mr. Pomerantz noted this morning, that  
8 the Claimant Trust Agreement will, in fact, include all of  
9 these details regarding the administration of the disputed  
10 claims reserve.

11 However, as the Court has pointed out, that trust  
12 agreement has not been filed. We have seen drafts as a  
13 member of the Committee, but it certainly is not in final  
14 form. And, frankly, the last draft I reviewed didn't have  
15 any provisions or mechanics with respect to the disputed  
16 claims reserve.

17 And, again, as the Court pointed out, that document is  
18 not intended to be filed until one week before the voting  
19 deadline.

20 Your Honor, we believe that creditors should have more  
21 than one week, for sure, to consider plan provisions that  
22 could really substantially affect the outcome of these  
23 proceedings if any of these very large disputed claims,  
24 including UBS's claim, are ultimately allowed in any  
25 meaningful amount.

1           So we believe that these are key terms which should be  
2 included in the disclosure statement and in the plan and at  
3 the time of solicitation, and not submitted later in the plan  
4 supplement that won't be filed for a few more weeks.

5           Thank you, Your Honor.

6           THE COURT: Let me ask you one follow-up question.  
7 One objection UBS made in its pleading was that there was not  
8 an adequate description of why the Debtor's assets declined  
9 in value during the case, in value by over \$210 million  
10 between the petition date and June 30th, and why they were  
11 expected to decline an additional \$40 million more in the  
12 last six months of 2020.

13          The Debtor has incorporated language, it says -- I don't  
14 have it at my fingertips -- to address these issues. Do you  
15 feel like the Debtor did adequately address this objection?

16          MS. POSIN: I can say I think the Debtor addressed  
17 it. I don't know if I would say that it's adequate. It's a  
18 substantial amount of money. I mean, we thought at the  
19 beginning of the case (garbled) of in excess of \$500 million  
20 in assets, and we're now down to less than \$200 million.  
21 That's obviously a substantial change in a year. I know  
22 there is a high burn rate, but that certainly doesn't provide  
23 for that rationale, that substantial drop in asset value.

24          But it did make an attempt to address it in the  
25 disclosures that were filed with the Court yesterday. COVID-

1 related. I know there are some additional things they added.  
2 We certainly would like more detail. But at this point, we  
3 feel like at least an attempt was made to try to address that  
4 concern.

5 THE COURT: All right. Mr. Pomerantz, would you  
6 point the language out to me? Because I'm not sure I went  
7 back and looked at that one.

8 MR. POMERANTZ: Sure, Your Honor. In the  
9 supplemental disclosure we filed yesterday, on Page 2, at the  
10 bottom, we include a partial bridge. So there's really two  
11 issues going on here. What is the bridge of asset values to  
12 the last mark we have is June the 30th.

13 The second issue, though, is how do you turn those asset  
14 values into cash and how do you monetize them or what the  
15 expenses are.

16 So, when Ms. Posin referenced a roughly \$200 million,  
17 it's not the right comparison. The right comparison is what  
18 we have in the supplement, where we said that it was  
19 essentially \$550 -- \$566 million down to \$351 million,  
20 largely comprised of three issues.

21 One is a reduction in value of the investments because of  
22 COVID. Second, an offset in the note. And third, primarily  
23 due to the costs of the case.

24 But from that point of June 30th, to actually monetize  
25 the assets, through the liquidation analysis, through the

1 plan projections, those are based upon what we think we can  
2 generate for value.

3 And I understand Ms. Posin or UBS may not agree with our  
4 liquidation analysis. They may not agree with our  
5 projections. But we think they are sufficiently before  
6 creditors to enable them to vote. And to the extent there  
7 are any issues, they can be raised at that time.

8 Your Honor, should I address the other points that Ms.  
9 Posin made, or would you like me to address your questions?

10 THE COURT: Yes, go ahead.

11 MR. POMERANTZ: Okay. First, Your Honor, in terms  
12 of the date, Mr. Clemente provided me with an advance copy of  
13 his objection, because we were trying to see if we could work  
14 things out. It indicated in there that each of the Committee  
15 members intended to file joinders. So when I told Mr.  
16 Clemente that the Committee and its members could have an  
17 extension, what I contemplated was the joinders. I didn't  
18 contemplate a 25-page separate supplemental objection that I  
19 think that went well beyond the issues raised by the  
20 Committee. So that's why we had indicated that we believed  
21 it was filed late.

22 Your Honor, we've already talked about the release and  
23 exculpation and the unfair discrimination provisions --  
24 arguments, so I won't go into them anymore.

25 But the liquidation analysis, we think it's pretty clear.

1 We are going to generate less value if a trustee is going to  
2 liquidate these assets. That should be pretty self-evident.  
3 Mr. Seery, who has become intimately familiar with these  
4 assets over the last year or ten months since his  
5 involvement, there can't be a lot of argument that Mr. Seery  
6 is not going to -- is going to be able to generate more value  
7 for these assets than if you just put a Chapter 7 trustee in.

8 Secondly, having a whole set of professionals, a trustee,  
9 all his professionals, or our professionals, get up to speed  
10 is going to drive up the costs.

11 So those two issues in and of themselves sort of prove  
12 that the plan will provide more value than in a Chapter 7.  
13 And we think the liquidation analysis is sufficient. And,  
14 again, we don't quite understand, really, the feasibility  
15 argument. Again, the projections demonstrate that the  
16 company, post-reorganization, will have sufficient cash to  
17 fund its operations, to sell assets and make distributions.

18 Now, again, Ms. Posin may disagree. She may disagree and  
19 think the assumptions are too rosy. May think that the  
20 expenses cost more. And she is free to raise those issues in  
21 connection with confirmation.

22 And lastly, Your Honor, the disputed claims reserve,  
23 maybe perhaps it could have been included in the plan and  
24 disclosure statement. But to allay everyone's fears, what  
25 will ultimately be contemplated is allowance of the claims,



1 if not by agreement, by the Court, in terms of an allowance  
2 for a disputed claims reserve, and then when cash is  
3 distributed, reserving the cash. There's no contemplation of  
4 trying to stick people with illiquid assets as part of the  
5 reserve, the reserve issue.

6 So, look, we understand we have to fill in the blanks on  
7 those -- the disputed claim reserve. But people shouldn't  
8 get concerned that we're trying to do anything untoward. We  
9 want to make sure people have sufficient opportunity to look  
10 at it. Again, we don't think seven days is an unreasonably  
11 short time. However, as we discussed before, if Your Honor  
12 wants to move out the process, stretch it out a little bit to  
13 give people more time, the Debtor would not have an objection  
14 to that.

15 THE COURT: All right. Let me ask you this. The  
16 details of how -- the details, if any, on how the assets will  
17 be liquidated by the Claimant Trust, and timing, you know,  
18 like I don't know if there's going to be a deadline put on  
19 doing that and getting people paid: I mean, is that -- is  
20 that all going to be detailed in the Claim Trust Agreement?  
21 Or no?

22 MR. POMERANTZ: No, it isn't, Your Honor. Look.  
23 You know, we provided projections. The projections say that  
24 the assets will be liquidated in two years. The notes -- the  
25 demand notes collected during that two-year period. And that

1 any long-term notes will be monetized. Okay?

2 That is the broad brush. It would be against the  
3 creditors' interests if we were to provide more detail on  
4 specific assets and the timing of liquidation, on the timing  
5 of monetization of those assets. It is very important to  
6 maintain flexibility within that two-year time frame so Mr.  
7 Seery or whoever is the Claimant Trustee to monetize these  
8 assets in a way that's designed to maximize value, with the  
9 input of the Oversight Committee.

10 If we were put in here that Asset X is going to be  
11 liquidated in 90 days, and that's a public document, what is  
12 that going to do to the market for that asset? Well, I can  
13 tell you, people will wait it out and we will have disastrous  
14 results in value. We're already dealing with a fine line in  
15 two years, I mean, disclosing that, but Mr. Seery believes,  
16 based upon his intimate knowledge of these assets, that he  
17 can generate maximum value within that two-year period.

18 So, yes, Your Honor, it is important on what assets get  
19 liquidated when. There are a lot of assumptions that go into  
20 that, because these are not, for the most part, liquid  
21 assets. There are some public securities. But Your Honor,  
22 what we're trying to do -- again, in some sense, it's protect  
23 the creditors against themselves if they want that additional  
24 disclosure -- is monetize these assets in the way that's  
25 going to maximize value. And the type and level of

1 disclosure we provided we believe is sufficient, and anything  
2 in addition will be contrary to that goal.

3 THE COURT: Okay. All right. I guess the only  
4 objector I've not heard from is HarbourVest. So I'll hear  
5 from Mr. Stroik.

6 MR. STROIK: Thank you, Your Honor. Daniel Stroik  
7 from Debevoise & Plimpton representing HarbourVest.

8 We, like the UCC and others who spoke earlier today, also  
9 had some issues with the substance of the proposed plan, but  
10 intend to defer those until confirmation if they cannot be  
11 resolved before then. So, really, our issues are ones of  
12 disclosure.

13 I'll turn to the first one, because -- and we can cross  
14 it off the list, happily. The description of HarbourVest's  
15 claims which the Debtors revised in their amended disclosure  
16 statement is something that we can live with now. Obviously,  
17 it doesn't reflect all of the specific language that was  
18 circulated, but we appreciate their attempt to address our  
19 primary concerns. In particular, the revised description  
20 does a better job of describing the underlying allegations of  
21 serious misconduct which form the basis for our client's  
22 claims, and it also removes any mistaken impression that  
23 those claims are about to be readily resolved on the basis of  
24 their one-sentence inclusion of an -- in an omnibus  
25 objection, with other procedural objections to other claims.

1           So, we're resolved on that front.

2           As we raised in our filed objection, however, we do still  
3 take issue with the fact -- as do, apparently, many other  
4 creditors -- that the disclosure statement and proposed plan  
5 (inaudible) the Claimant Trust Agreement, which, of course,  
6 is not filed or otherwise available to our client.

7           Much of this has already been neatly discussed by Mr.  
8 Kathman and Ms. Posin. We don't want to belabor the point,  
9 but did want to spend a few moments on that topic.

10          While the UCC evidently has visibility and input into the  
11 Claimant Trust Agreement and related plan supplement  
12 documents, the Debtor's major creditors who are not members  
13 of the Committee also need to be able to weigh in, with  
14 sufficient time to raise any issues with the plan mechanics  
15 effectively embedded in that agreement before confirmation  
16 and before making a voting decision in order for that  
17 decision to be an informed one.

18          At least some members of the UCC, as indicated by UCC  
19 counsel, may be okay with the timing and structure of the way  
20 those plan mechanics are being disclosed, but the UCC is  
21 heavily involved in closed-door negotiations on its contents.  
22 Our client, as well as other major creditors, is not. So, in  
23 this respect, we're -- HarbourVest is positioned, as are  
24 other creditors, worse than UBS, who also has an issue with  
25 the lack of disclosure, as we don't have an interim drafts,

1 nor have our views on those important documents been  
2 solicited so far.

3 As Your Honor noted, of course, it's not unheard of for  
4 governance documents to be filed later in the case in a  
5 supplement, but we're not talking about filling in the  
6 details of reasonable and customary organizational documents,  
7 and we're not talking about a case which, you know, has some  
8 real time constraint such that we need to play fast and loose  
9 with disclosure.

10 Instead, in an important sense, the Claimant Trust  
11 Agreement really is part of the plan. Many of the plan  
12 mechanics simply indicate work as described in the trust  
13 agreement itself. We just don't see any reason, in this  
14 particular case, to defer disclosure on those key issues.  
15 Our view is, of course, that those mechanics, at least at a  
16 high level, do need to be described in the disclosure  
17 statement and not deferred to a supplement. But at a  
18 minimum, creditors do need more than a week between voting on  
19 a plan and their first disclosure of some of its key terms,  
20 particularly creditors who have not received advance copies,  
21 especially when those terms are going to be disclosed when  
22 piled on top of other more typical supplementary materials at  
23 the same time in the supplement.

24 THE COURT: All right. Thank you.

25 MR. STROIK: Thank you.

1 THE COURT: I believe I've heard from everyone who  
2 lodged an objection. Correct?

3 MS. MASCHERIN: Terri Mascherin on behalf of the  
4 Redeemer Committee. Would you indulge me just very briefly  
5 to speak to the release issue?

6 THE COURT: Yes. Go ahead.

7 MS. MASCHERIN: Thank you, Your Honor. I just  
8 wanted to underscore, Your Honor, the conviction of the -- of  
9 my client and the Creditors' Committee with regard to the  
10 release issue. And I think it really -- you know, I could  
11 regale Your Honor with dramatic readings from the arbitration  
12 awards in my case, in the case that we brought against the  
13 Debtor, but Your Honor is already quite familiar from the  
14 Acis case with the misdeeds committed by several senior  
15 inside employees of the Debtor. And that's really what we're  
16 talking about. That's where the rubber hits the road with  
17 regard to these releases and our disagreement with the  
18 Debtor.

19 Now, while my client has the utmost respect for Mr. Seery  
20 and for the independent board, we just have a fundamental  
21 disagreement with respect to how to deal with the situation  
22 of this limited number of senior insider employees whose  
23 conduct has been found by Your Honor and has been found by  
24 the arbitration panel in the Redeemer Committee case to have  
25 given rise to at least over \$160 million towards our allowed

1 claims against this estate.

2 We're not talking about something ethereal, as Mr.  
3 Pomerantz said earlier. We are talking about a limited  
4 number of senior people who -- who had been doing things that  
5 have brought liability on the estate already. And we're  
6 talking not only about the possibility that, Your Honor, that  
7 the estate might have claims against those individuals, but  
8 we're talking about their knowledge. Your Honor has alluded,  
9 both in this hearing and a week ago, to the Byzantine  
10 structure of Highland Capital Management and its affiliates.  
11 We're talking about giving releases out of the gate to a  
12 limited number of very senior, very knowledgeable employees  
13 who, you know, to use a colloquial term, know where the bodies  
14 are buried, know how things were done. That knowledge will be  
15 very important to the Litigation Trustee when he comes on the  
16 job.

17 And Your Honor, I liken this to the situation in the movie  
18 *The Untouchables*. You know, Al Capone's accountant gets a  
19 free pass after he has cooperated. That's all we're asking  
20 for here, Your Honor. If these releases are to be given to  
21 these very senior employees who truly know where the bodies  
22 are buried, then it ought to only be after the fact and if  
23 they have cooperated, not only with respect to monetizing  
24 assets and determining claims, which, after all, they've been  
25 pretty handsomely compensated for already over the past year,

1 but if they give value, new value to the estate by assisting  
2 or providing their knowledge with respect to pursuing these  
3 claims.

4 Thank you, Your Honor.

5 THE COURT: Thank you, Ms. Mascherin.

6 MR. POMERANTZ: Your Honor, if I may briefly respond  
7 to Ms. Mascherin's comments?

8 THE COURT: You may.

9 MS. PATEL: Your Honor, this is Rakhee Patel. If I  
10 could just very briefly be heard, I think that might expedite  
11 Mr. Pomerantz's response.

12 THE COURT: Go ahead.

13 MS. PATEL: But just for the record, on behalf of  
14 Acis -- on behalf of Acis Capital Management, Your Honor, we  
15 did file a joinder in the Committee's overall objection, and I  
16 just wanted to point that out. I think the Court would  
17 perhaps might be aware of it. And it can be found at Docket  
18 1241. Again, 1241.

19 And I just wanted to -- I'm not going to point, Your  
20 Honor, I think we incorporate Mr. Clemente and Ms. Posin and  
21 Ms. Mascherin's points, so I won't cover it, particularly in  
22 light of the fact that we had a very lengthy hearing relating  
23 to many of Acis's claims, and Your Honor is very familiar with  
24 these issues, just last week.

25 So, but I did want to, at least just for purposes of the



1 record and so the Court is clear and understands that the  
2 Committee is in lockstop with respect to this, I did want to  
3 at least raise for the Court that Acis did file that joinder.

4 THE COURT: All right. Thank you.

5 MR. POMERANTZ: Your --

6 THE COURT: And I -- you know, I didn't mean to  
7 neglect either Redeemer Committee or Acis. What -- I looked  
8 at your objections last week, but then I looked at the  
9 Debtor's chart of who had been addressed, and I thought maybe  
10 we were just down to the UCC generally, UBS, HarbourVest,  
11 Daugherty, and PBGC. So that's why I went to those five and  
12 said, Are we done?

13 All right. Mr. Pomerantz, your last words in rebuttal?

14 MR. POMERANTZ: Sure. Your Honor, I think Ms.  
15 Mascherin's comments are very revealing. She did not try to  
16 tell Your Honor at all that the estate has claims against the  
17 people getting released. What she clearly said is what the  
18 Committee wants to do, is hold the releases hostage so that  
19 these people can participate. She's making the argument,  
20 which she's entitled to make, that sufficient consideration  
21 will include cooperation.

22 Now, Your Honor at the confirmation hearing will have to  
23 weigh two things. On one hand, you'll have to weigh what  
24 claims exist that are being released and what consideration is  
25 being provided.

1 Now, this is not about claims against individual  
2 employees. I think Ms. Mascherin was pretty clear about that.  
3 It's being able to use those employees to pursue the agenda of  
4 the Litigation Trustee.

5 Now, of course, any of the employees will have a duty to  
6 respond to subpoenas, to provide information, to give  
7 testimony. So whether a release is provided or not, they are  
8 going to have to provide information to assist the Litigation  
9 Trustee.

10 But I thought it was very revealing. And, again, this is  
11 really not about claims asserted against people. Because,  
12 let's be honest, in lieu of this case even pending, the  
13 Committee would have filed those claims if they did exist.

14 So, Your Honor, again, we think this is purely a  
15 confirmation issue. The Court does not have an evidentiary  
16 record on any of these issues, cannot make the decision, and  
17 we should be allowed to proceed to confirmation to address any  
18 remaining objections, including the ones that were raised  
19 today.

20 THE COURT: All right. I actually have one more  
21 question. Should I be clear from reading the disclosure  
22 statement or will it be in the plan supplement on this point:  
23 Okay. I know the Debtor manages about I guess we're at \$300  
24 million or so of its own assets. I mean, that's the number  
25 we've talked about has gone down during COVID. I guess it's

1 -- well, it was \$566 million as of the petition date. It was  
2 down to \$351 million on June 30th. Okay. Here's my question.  
3 Should I be clear from the disclosure statement that it's that  
4 pot of assets which will be monetized over time, plus any  
5 causes of action the Committee pursues and monetizes, that  
6 that's the bundle of assets? Or, or with regard to funds  
7 owned by related entities -- I know people don't like me using  
8 it, but you know what I'm talking about, other Highland  
9 entities -- you know, I've heard at some point, read at some  
10 point, there's \$6 billion or so of funds that Highland  
11 manages, you know, through the shared services agreement.  
12 Would the stream of revenue that Highland earns managing those  
13 assets, would that be something that the creditors might  
14 receive the benefit of under the plan, or no? Should that be  
15 clear to me one way or another, or no?

16 MR. POMERANTZ: I think it should be clear, Your  
17 Honor, and I think at this point it is not anticipated that  
18 several of those related entities' shared services agreements  
19 would continue.

20 I think the Debtor is in negotiations with Mr. Dondero and  
21 his related entities to provide some type of transition,  
22 hopefully consensually, and then some perhaps shared use of  
23 certain resources, like physical location, computer systems,  
24 and whatnot.

25 But the way the creditors are going to get paid are

1 primarily for -- from the monetization of the assets that  
2 make up the \$351 million as of June 30th that you identified.  
3 And I believe that should be clear in the disclosure  
4 statement.

5 THE COURT: All right. But let me just ask, for  
6 example, Mr. Clemente: Was that -- is that clear to you?  
7 Because it wasn't clear to me, and I had this huge question in  
8 my mind.

9 I mean, I don't know what that revenue stream is that  
10 Highland earns for providing management services or portfolio  
11 management services, shared services, to those related  
12 entities and their \$6 billion of funds, but I would imagine  
13 it's a very significant cash flow stream. That is not going  
14 to be used. You know, I understand the hope is it wouldn't  
15 need to be used because we would never hit the \$300 million or  
16 so of Debtor-owned assets. But is that clear to you, Mr.  
17 Clemente, that if things don't go the Debtor's way and UBS  
18 gets a big claim and HarbourVest gets a big claim and HVA,  
19 that there isn't going to be any revenue source from  
20 Highland's -- the Reorganized Debtor's ongoing management;  
21 that, in fact, those services are going to be transitioned, I  
22 guess, to Dondero or others? Mr. Clemente, is this clear to  
23 the creditors, do you think, from the disclosure statement, or  
24 not?

25 MR. CLEMENTE: You know, let me -- Your Honor, let me

1 offer a couple of comments on that. I mean, in light of --  
2 again, the direction is obviously the monetization and  
3 liquidation. And so from the perspective of the Committee,  
4 the decision to either continue supporting the contracts that  
5 you're referring to now or jettisoning them is sort of a cost-  
6 benefit one. And the concept of having to keep the  
7 infrastructure in place to continue to service those contracts  
8 is something that the Committee took into consideration in  
9 connection with the current plan construct. And so embedded  
10 in that decision is the consequence that that would be  
11 transitioned away because, frankly, it's -- it wasn't cost-  
12 effective for the Debtor to continue to provide those services  
13 on a reorganized basis.

14 In terms of having them transition to Mr. Dondero, you  
15 know, that's something that's still subject to debate among  
16 the Committee as to whether there may be a more efficient or  
17 effective way to deal with those agreements, Your Honor. But  
18 at a fundamental point, yes, the Committee has understood that  
19 that revenue stream would ultimately go away because it simply  
20 isn't cost-effective for the Debtor to continue to provide  
21 those services.

22 THE COURT: It's not cost-effective to continue to  
23 provide the services of managing \$6 billion of assets? I  
24 mean, you're the one --

25 MR. POMERANTZ: Your Honor, if I may.

1 THE COURT: -- who's looked into this, not me, but  
2 that seems surprising to me.

3 MR. POMERANTZ: Yeah. Your Honor, the Debtor ran at  
4 an operational deficit. So the costs of the case were not  
5 only the professional fees in the bankruptcy and  
6 infrastructure, but as Mr. Clemente noted, the revenue that's  
7 generated was not sufficient for the infrastructure that was  
8 required to provide those services, the 70 or so employees  
9 that the Debtor has.

10 So the plan contemplates the Debtor essentially  
11 terminating those employees. Again, it's our view that the  
12 Claimant Trustee, under the auspices of the Oversight  
13 Committee, will have that decision. But if we thought that  
14 there could be value in retaining those contracts, we would  
15 have done so and the Committee would have wanted us to do so.

16 But this, again, is one important issue that the Committee  
17 and the Debtor have worked through and have come to agreement  
18 on. So, again, everyone is focused today on the issues that  
19 the Committee and the Debtor haven't been able to resolve, but  
20 the reason this plan process is taking a long time, because  
21 it's not the typical process, and the issues, one of the  
22 issues on what should the post-effective date structure,  
23 organization, and business operations do is something we have  
24 shared a lot of information with the Committee and have come  
25 to agreement with.

1           So, this is one of these instances where the process has  
2       worked. We deal with the Committee; the Committee deals with  
3       us. It's just not cost-effective to continue to provide those  
4       services.

5           THE COURT: All right. Well, I'm hesitating and this  
6       one is a hard one for me. Maybe I'm comparing apples to  
7       oranges. But in Acis, there was interest in portfolio  
8       managers bidding on the shared services agreement and the sub-  
9       advisory agreement. You know, we had an entity called Brigade  
10      and we had a stalking horse called Oak Tree. These were, you  
11      know, not without risks, but people were interested in  
12      stepping in that management role.

13           So, again, I'm hesitating here. I don't want to get in  
14      the middle of negotiations. But my real question was a  
15      disclosure question, because I wasn't clear, reading the  
16      disclosure statement, whether that was a stream of revenue  
17      that might inure to the benefit of the Creditor Trust, might  
18      be monetized. So, I think, at the very least, we need some  
19      disclosure about that having been evaluated and decided it  
20      wasn't, you know, value-producing or whatever.

21           MR. KATHMAN: Your Honor? Your Honor, may I just  
22      real briefly? Jason Kathman, for the record.

23           I will share that it's not my client's opinion that it's  
24      not cost-effective. In fact, my client has made proposals to  
25      the Debtor and its Committee to assist in those type of things

1 in a cost-effective manner, and perhaps even do it at 20  
2 percent of what the Debtor is currently doing.

3 So I would agree with Your Honor. There needs to be at  
4 least some disclosure, and the Debtor maybe can disclose what  
5 they've done to investigate that, because it's my client's  
6 opinion that it can -- that there can be a cost-effective way  
7 to do that and that those shared services agreements do have  
8 some value in this case.

9 THE COURT: All right.

10 MR. POMERANTZ: Your Honor, I'll point out that these  
11 contracts, shared service contracts are terminable at will,  
12 number one. They are arguably personal service contracts.  
13 While the Debtor did receive and the independent board members  
14 did receive Mr. Daugherty's proposal, didn't find it  
15 particularly executable or something worth considering.

16 But we'll be happy to add additional disclosure, a few  
17 sentences on this issue, and Mr. Seery at confirmation will be  
18 happy to testify regarding these issues, what he did, and the  
19 conclusions that he reached that have led to the decisions  
20 that we are making.

21 THE COURT: Okay. All right. Well, we're going to  
22 slow this down a little, and I've got different ideas about  
23 how we do this. Here are two disclosure statement objections  
24 that I am sustaining, and then I'm going to give you a big-  
25 picture point.



1 With regard to the various objections that the releases  
2 are overbroad, vague, improper, I sustain those objections. I  
3 think a simple solution -- that the Debtor doesn't like,  
4 apparently -- is just listing out the human beings who the  
5 Debtor proposes to give a release to, even if that's 70  
6 employees. I just think the current drafting is completely  
7 unworkable because you have to kind of start with, here's a  
8 release, oh, but here are the carve-outs, and then you've  
9 offered more carve-outs, which is appreciated, but I just feel  
10 like, in a case like this, where a big part of potential  
11 future recovery is causes of action, maybe avoidance actions,  
12 and where there has been, you know, findings by prior  
13 arbitration panels of misconduct here and there, there is just  
14 no way we can have a release like this.

15 So I am going to sustain the objection to the release, and  
16 the Debtor can either make another stab at it or abandon it,  
17 whatever you think, because we would obviously potentially  
18 have a confirmation issue down the road as well. But right  
19 now, we have a plain old disclosure problem: inadequate,  
20 vague, overbroad. It's just going to lead to confusion.

21 The second disclosure statement objection that I'm going  
22 to sustain, well, it all boils down to the plan supplement. I  
23 think, in the context of this case, we need to have a plan  
24 supplement as part of the disclosure statement that goes out,  
25 whether it's all worked into this document or attached as an

1 exhibit or -- and I'm hesitating because I don't want, you  
2 know, a thousand-page document to go out. You're going to  
3 have to be thoughtful. But there's just too much that I think  
4 is too significant in the context of this case to defer to --  
5 I think now we have November 23rd, the Monday before  
6 Thanksgiving. I mean, so many very essential components of  
7 the plan, I think, are going to be described in that  
8 Claimants' Trust Agreement, the Litigation Trust Agreement,  
9 the human beings, the compensation.

10 And, again, if we were under the gun, so to speak, with  
11 deadlines, you know, we had a debtor-in-possession financing  
12 order about to expire or other deadlines looming, I would be  
13 inclined to use the same old path we use in so many Chapter  
14 11s, where, you know, let's go ahead and send out the  
15 disclosure statement and plan, and the plan supplement later.  
16 But I think, in the context of this case, it's just needlessly  
17 delaying important information getting in the hands of the  
18 creditors.

19 So, those are the two disclosure statement issues. Now,  
20 I'm going to say, third, just kind of a big-picture issue: I  
21 am really, really concerned about marching forward with  
22 solicitation of a plan that lacks support of the Creditors'  
23 Committee. And again, as we've said so many times, context is  
24 everything. This isn't a case where we have, you know, the  
25 secured lender with a blanket lien on everything and a

1 creditors' committee upset because they're getting a pittance  
2 in a litigation trust and they don't, you know, maybe  
3 understand there's just no value here beyond secured debt.  
4 You know, that's what we all see 99 times out of a hundred in  
5 Chapter 11 cases.

6 This is a case that is all about the Unsecured Creditors.  
7 And, you know, early on in the case they backed off of wanting  
8 a Chapter 11 trustee, the Committee did, because of the  
9 corporate governance agreements they reached and their being  
10 given standing to pursue causes of action. And, you know, at  
11 some point we've got to move forward, even without consensus,  
12 but I'm just concerned at this juncture that this is where we  
13 are.

14 Now, we're still in exclusivity, and I don't know how much  
15 longer we will still be in exclusivity. It's getting kind of  
16 close. And I'm not hearing from the Creditors' Committee that  
17 they have the proverbial plan in their briefcase ready to  
18 file. So, you know, that's significant to me. It's not like  
19 they're offering a competing plan. But I'm real concerned  
20 that we've got a plan without support of our Creditors'  
21 Committee.

22 And as a subset of that, I am concerned about this  
23 potential cramdown scenario, where an administrative  
24 convenience class, consisting mainly of the Debtor's former  
25 law firms, being the impaired accepting class. You know, that

1 it's not *per se* improper, but when I think of the Fifth  
2 Circuit authority that's talked about is there a business  
3 justification for separately classifying unsecured creditors  
4 of similar priority, I'm not sure I've ever seen it in a  
5 situation like this. We know it's usually in a situation of  
6 separately classifying a big unsecured deficiency claim of a  
7 secured creditor from the trade debt. Or, you know, I guess  
8 we've seen it maybe in contexts of litigation claims versus,  
9 you know, small little vendors.

10 But I'm concerned about this scenario, so I'll just let  
11 you know that I might be convinced, but right now I'm a little  
12 concerned about that.

13 So, we're slowing down the train a little. And, again,  
14 I'm very sensitive about the so-called burn rate on this. You  
15 know, I see the interim fee statements. I know how expensive  
16 this case is getting. But at this point, I think we need to  
17 slow it down a little and get adequate information worked into  
18 this document.

19 So, let's talk about what makes sense timing-wise.

20 MR. POMERANTZ: Your Honor, I have a couple comments  
21 and then a proposal on timing, and I'd like to make it.

22 THE COURT: Okay. Go ahead.

23 MR. POMERANTZ: So, first, I want to, and I think  
24 it's important for everyone to hear and make sure at least I  
25 understand and the company understands: The issue on the

1 releases from a disclosure perspective would be addressed by  
2 identifying all of the people getting releases? Is that what  
3 Your Honor has said? Am I understanding Your Honor correctly?

4 THE COURT: Yes. I don't know how else we can do it.  
5 I mean, --

6 MR. POMERANTZ: Okay. Understood.

7 THE COURT: -- there still may be a confirmation  
8 objection, but I'm just saying our exclusions are getting so  
9 big and so many that at this point I feel like you just need  
10 to list out the people and then people know.

11 MR. POMERANTZ: Understood.

12 THE COURT: Uh-huh.

13 MR. POMERANTZ: Understood. My next question is, if  
14 the Debtor did that and if the Committee ultimately decided  
15 that was still insufficient, based upon your comments of the  
16 Committee's support, would you at the disclosure statement  
17 hearing say, okay, I'm allowing that to go out for voting, or  
18 are you going to say to the Debtor, I understand you've  
19 addressed the disclosure issue, but if the Committee is not on  
20 board then I'm not letting it go out for voting? I just want  
21 to understand Your Honor's thought process there.

22 THE COURT: Well, narrowing in on this one issue, if  
23 you list out, Here are the people we propose to get releases,  
24 okay, they say, We're not going to support it, if this is the  
25 issue we were down to, I would let it go out and then you'd

1 have to put on evidence at the confirmation hearing why these  
2 were appropriate, legally-permissible releases. You'd have a  
3 burden of proof.

4 MR. POMERANTZ: Totally understand.

5 THE COURT: Uh-huh.

6 MR. POMERANTZ: Totally understand, and we understand  
7 the Court's comments. We understand the Committee. But I  
8 think that was helpful so that we could hear Your Honor's  
9 thinking about it.

10 With respect to the plan supplement agreement, on the  
11 timing here, just looking at a calendar and obviously without  
12 the benefit of conferring with anyone, you know, least of  
13 which Mr. Seery, who I answer to, I would look at filing an  
14 amended disclosure statement to address some of the issues  
15 that were raised today and the plan supplement agreement with  
16 the Claimant Trustee Agreement, the identity of the members,  
17 the compensation. I'm not sure we necessarily need to have  
18 the corporate documents by then, but to do that by November  
19 13th, to then provide that any objections to the disclosure  
20 statement and the plan supplement could be filed by November  
21 19th, and then a hearing to consider the adequacy of the  
22 disclosure statement on November 23rd.

23 I think that would give us time to thoroughly work through  
24 the issues with the Committee on these issues. It will give  
25 people time to respond. And then we could have a disclosure

1 statement hearing in advance of the Thanksgiving holiday.  
2 Would that make sense to Your Honor?

3 THE COURT: All right. Well, I think I'm okay with  
4 this. I'll hear contrary arguments. Mr. Clemente?

5 MR. CLEMENTE: Yes, Your Honor. Just a couple of --  
6 if I may just back up for a second. I very much appreciate  
7 the ruling that Your Honor gave. I think -- and just to be  
8 clear, I don't think it really changes anything from where we  
9 are today. Listing insiders in the disclosure statement is  
10 not going to change the view of the Committee from a  
11 perspective of whether that releases should just be dead on  
12 arrival going out to creditors.

13 So, again, I appreciate your clarifying comments, but I  
14 just wanted to make sure that Your Honor was clear that I  
15 don't think that that's really, you know, the issue that the  
16 Committee has been focused on. It's -- it is the substance of  
17 those releases. And so putting a list together of those  
18 releases I don't think makes sense. Or, excuse me, makes  
19 perfect sense because of Your Honor, but I don't think that it  
20 resolves the issue that the Committee has focused on.

21 Second, Your Honor, you know, another thing to consider --

22 THE COURT: I guess, thinking through that -- and  
23 I've got to hurry up here because I have a 1:30 hearing and a  
24 2:30 hearing and we need a lunch break. But thinking through  
25 that issue, I guess, you know, the Debtor is going to bear a

1 risk -- or I don't know if you'd call it a risk -- but that we  
2 get to -- everyone's going to bear a risk that we get to  
3 confirmation and they don't sustain their burden of showing  
4 either the permissibility or the appropriateness of, let's  
5 say, a release against John Doe or a release against ten  
6 different employees, and then, okay, can we sever that out and  
7 the plan is still confirmed? I mean, --

8 MR. CLEMENTE: Your Honor, --

9 THE COURT: -- we're going to have a risk on that,  
10 right?

11 MR. CLEMENTE: We'd agree. And the risk,  
12 respectfully, is not the borne by the Debtor. As Your Honor  
13 aptly pointed out, --

14 THE COURT: Uh-huh.

15 MR. CLEMENTE: -- it is the Unsecured Creditors here  
16 that bear the brunt of this case. And the idea that we should  
17 go forward where the outcome is, well, if the Debtor is, you  
18 know, ultimately not able to bear its burden, that's its  
19 issue. But it's actually our issue, Your Honor, which is why,  
20 you know, the expediency of the situation is now in addressing  
21 that, as opposed to sending something out to vote that we know  
22 we're not going to have the Committee's support on, rolling  
23 into a confirmation hearing, and then you have creditors that  
24 are faced with the outcome being a plan that isn't confirmed  
25 and having spent the time, money, and resources up to that



1 point.

2 That's the difficulty that the Committee will continue to  
3 find itself in, Your Honor.

4 THE COURT: Okay. All right. Anyone want to comment  
5 about the timing?

6 MR. CLEMENTE: Your Honor, one, I guess, one  
7 question, I suppose. It seems like we're sort of kicking this  
8 out quite a bit. I'm wondering whether there isn't some sort  
9 of interim step that can be taken in terms of timing. But,  
10 you know, maybe back for some sort of status call or something  
11 like that, Your Honor, to let you know where we are. But it  
12 sounds like -- but I don't have a problem with Mr. Pomerantz's  
13 scheduling concept. I just want to make sure that we're not  
14 needlessly extending things out.

15 THE COURT: Well, I think this sounds appropriate,  
16 and I dangled out there, you know, the proverbial question:  
17 Do you have a plan in your briefcase? I mean, I don't know  
18 when -- I don't remember the deadline on exclusivity here.  
19 But --

20 MR. POMERANTZ: I was going to address that, Your  
21 Honor. Our deadline was extended, I believe, to December 5th,  
22 which is the day after confirmation. Obviously, we're not  
23 getting to confirmation on December 4th. And we would seek an  
24 extension of exclusivity until the end of the confirmation  
25 hearing.

1           So, again, Your Honor doesn't have to decide that now. If  
2           Your Honor wants, I guess we could deal with that at the  
3           continued hearing on the disclosure statement. I'm not sure  
4           if Your Honor would want a separate motion filed. But the  
5           point is that, if Your Honor does give the Debtor the  
6           opportunity to go to confirmation and for some reason doesn't  
7           confirm, that we should still be able to then deal with it at  
8           that time and not have exclusivity automatically expire.

9           THE COURT: All right. Well, --

10          MR. CLEMENTE: Your Honor, I think, if I may very  
11          quickly.

12          THE COURT: Go ahead.

13          MR. CLEMENTE: The plan, Your Honor, yes, I don't  
14          have it in my pocket, but it's not very complicated. I think  
15          you know exactly what our issues are. So the idea that we  
16          would go to a disclosure statement and then not have that  
17          approved and have a further exclusivity extension, Your Honor,  
18          just -- it just -- your comments are well taken. The  
19          Committee will decide whether we'll come before you seeking to  
20          terminate exclusivity even before the currently -- you know,  
21          the next scheduled disclosure statement.

22          THE COURT: All right. Well, I am going to require a  
23          motion to be filed for any extension for the Debtor or  
24          certainly any termination. So, you know, we're now over a  
25          year into the case, and I'm just letting you know, Mr.

1 Pomerantz, I'm not likely to extend exclusivity unless I hear  
2 something really compelling that I'm not hearing yet in this  
3 case.

4 So, let me see about the Monday before Thanksgiving.

5 (Court confers with Clerk.)

6 THE COURT: We can give you 1:30 on November 23rd.

7 Okay?

8 MR. POMERANTZ: That works, Your Honor.

9 (Court confers with Clerk.)

10 THE COURT: All right. So, Mr. Pomerantz, if you  
11 could upload an order continuing this hearing on the  
12 disclosure statement, and note in it the November 13th  
13 deadline, the November 19th deadline, and then the hearing at  
14 1:30 on November 23rd.

15 All right. Well, I guess I'm going to see you at least  
16 once before then, on the UBS motion for summary judgment,  
17 which I think is November 20th.

18 MR. POMERANTZ: Your Honor, we also have a 3018  
19 motion for HarbourVest, which is, I believe, maybe the 10th.

20 THE COURT: Okay.

21 MR. POMERANTZ: And then there's also a 3018 motion  
22 for Daugherty, which I don't know if we have a date yet. I  
23 know there's a briefing schedule. The motion has been filed.  
24 We will confer with Mr. Daugherty's counsel and then approach  
25 your Clerk and figure out an appropriate date for that hearing

1 as well.

2 THE COURT: All right. Thank you. Well, I really  
3 wish you good luck in further good-faith negotiations here.  
4 We really have more big open issues than I would like to have,  
5 but my most concerning one is no agreement with the Creditors'  
6 Committee. So, anyway, I hope that some progress is made.  
7 All right. We stand adjourned.

8 MR. POMERANTZ: Thank you, Your Honor.

9 THE CLERK: All rise.

10 (Proceedings concluded at 12:51 p.m.)

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CERTIFICATE

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21

I certify that the foregoing is a correct transcript to  
the best of my ability from the electronic sound recording of  
the proceedings in the above-entitled matter.

22

**/s/ Kathy Rehling**

**10/28/2020**

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Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

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## **EXHIBIT TTTTTT**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

In Re: ) **Case No. 19-34054-sgj-11**  
) Chapter 11  
)  
HIGHLAND CAPITAL ) Dallas, Texas  
MANAGEMENT, L.P., ) Wednesday, October 28, 2020  
) 9:30 a.m. Docket  
Debtor. )  
) PATRICK DAUGHERTY'S MOTION  
) TO CONFIRM STATUS OF  
) AUTOMATIC STAY [1099]  
)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,  
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor: John A. Morris  
PACHULSKI STANG ZIEHL & JONES, LLP  
780 Third Avenue, 34th Floor  
New York, NY 10017-2024  
(212) 561-7700

For Patrick Daugherty: Jason Patrick Kathman  
PRONSKE & KATHMAN, P.C.  
2701 Dallas Parkway, Suite 590  
Plano, TX 75093  
(214) 658-6500

For Patrick Daugherty: Thomas A. Uebler  
MCCOLLOM D'EMILIO SMITH UEBLER,  
LLC  
Little Falls Centre Two  
2751 Centerville Road, Suite 401  
Wilmington, Delaware 19808  
(302) 468-5960

Recorded by: Michael F. Edmond, Sr.  
UNITED STATES BANKRUPTCY COURT  
1100 Commerce Street, 12th Floor  
Dallas, TX 75242  
(214) 753-2062

1 Transcribed by: Kathy Rehling  
2 311 Paradise Cove  
3 Shady Shores, TX 76208  
4 (972) 786-3063  
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1                   DALLAS, TEXAS - OCTOBER 28, 2020 - 9:41 A.M.

2                   THE COURT: We have a Highland setting today. It  
3 feels like we were just here yesterday, and I think we were.  
4 This is Case No. 19-34054, Patrick Daugherty's Motion to  
5 Confirm Status of Automatic Stay, or alternatively to modify  
6 it. For the Movant, Mr. Daugherty, I see we have Mr. Kathman  
7 here, correct?

8                   MR. KATHMAN: Good morning, Your Honor. Jason  
9 Kathman on behalf of Mr. Daugherty. And I also have with me  
10 my co-counsel from Delaware, Tom Uebler with the firm McCollum  
11 D'Emilio Smith & Uebler. And he's been admitted *pro hac vice*  
12 in the case, Your Honor.

13                  THE COURT: Okay. Good morning to both of you.

14                  MR. UEBLER: Good morning, Your Honor.

15                  THE COURT: We had one objection to this motion by  
16 the Debtor. Who do we have appearing for the Debtor team? I  
17 see Mr. Demo's name up there. Are you going to be taking the  
18 lead for the Debtor this morning, Mr. Demo?

19                  MR. MORRIS: Good morning, Your Honor. This is John  
20 Morris. I'm from Pachulski Stang Ziehl & Jones. I'll be  
21 handling this matter today.

22                  THE COURT: Okay.

23                  MR. MORRIS: And --

24                  THE COURT: Good morning.

25                  MR. MORRIS: And just there's not only -- we filed

1 not only an opposition, but just to be clear, there's a cross-  
2 motion for the extension of the stay to the nondebtors. And  
3 just to make sure the Court is aware, we also filed an  
4 adversary proceeding seeking either a 105 injunction, or  
5 alternatively, the extension of the stay to the Delaware  
6 action.

7 So if Your Honor hadn't seen it, all of that is part of  
8 today, so it's -- they're related to today's proceedings.

9 THE COURT: All right. Well, I was aware of the  
10 adversary, but just to be clear, we don't -- we don't have  
11 your countermotion, if you will, set for hearing technically  
12 today, correct?

13 MR. MORRIS: I think that's right, although it's  
14 styled as the same thing and it's part and parcel of the  
15 objection.

16 THE COURT: All right. Well, I didn't see any other  
17 parties in interest file a pleading in this contested matter.  
18 So, I know there are lots of interested observers on the  
19 video, but I won't at this time take appearances from others.

20 So, with that, Mr. Kathman or Mr. Uebler, how did you want  
21 to proceed this morning?

22 MR. KATHMAN: Your Honor, I'll be handling the  
23 majority of the argument this morning, and Mr. Uebler really  
24 is here this morning if Your Honor had questions about what  
25 has gone on in Delaware or what has occurred in the Delaware

1 cases. Mr. Uebler has been the one that's litigated all those  
2 issues, so he's kind of a point of information if Your Honor  
3 had questions regarding that.

4 THE COURT: All right.

5 MR. KATHMAN: Your Honor, what I thought I would do  
6 is my argument is actually pretty brief, but what I thought I  
7 would do also in a part of my argument is take a little bit of  
8 this time just to give Your Honor kind of a summary of kind of  
9 what the basis of Mr. Daugherty's claims are in this case, so  
10 that you can understand how that fits into the context of this  
11 case.

12 That word "context," I know, has been used a lot during  
13 the pendency of this case, and so I thought, while we have the  
14 time this morning, I would just spend just a few minutes just  
15 kind of explaining what the basis of Mr. Daugherty's claim is.  
16 And I think that that will be relevant, you'll see, in how  
17 that ties into what the relief is that we're requesting this  
18 morning.

19 THE COURT: Okay.

20 MR. KATHMAN: Your Honor, the hearing actually this  
21 morning is really pretty straightforward. Fifth Circuit law  
22 is clear that the stay does not apply to nondebtors, and Fifth  
23 Circuit law is also clear that seeking the severance of a  
24 debtor does not violate the automatic stay.

25 I filed this motion really out of an abundance of caution

1 as a so-called "belt and suspenders," because when it comes to  
2 the automatic stay, I'm of the opinion to always be more  
3 overly cautious than underly cautious, one. And number two,  
4 in a situation where we have a history of a very, very, very  
5 litigious debtor here, it was just a risk that I wasn't  
6 willing to take, even in the face of blatant Fifth Circuit law  
7 that this doesn't violate. This is just one of those  
8 situations where I'd rather ask for permission and have your  
9 Court -- have Your Honor bless it before we go take actions in  
10 the Delaware court.

11 Number two, Your Honor, the Debtor, by filing an adversary  
12 proceeding seeking a 105 injunction, pretty much implicitly  
13 agrees that the stay doesn't apply to the nondebtors. Because  
14 if it applied to the nondebtors, then they wouldn't need to  
15 seek a 105 injunction and wouldn't need to be seeking Your  
16 Honor to extend the automatic stay to those parties.

17 So the way I see it, Your Honor, we have Fifth Circuit law  
18 that says that the stay doesn't apply to nondebtors. That's  
19 pretty abundantly clear. And two, we have the Debtor  
20 essentially implicitly agreeing to that position.

21 And the final thing, Your Honor, I would say is that --  
22 and Your Honor hit on this -- is that the temporary injunction  
23 is not set for hearing this morning. They filed an adversary  
24 proceeding. They sought a temporary injunction. My client's  
25 answer deadline to that temporary injunction has not yet

1 passed. We have until November 18th to answer that.

2 The law in this circuit and in other circuits are, when  
3 you're seeking a 105 injunction, you're entitled to due  
4 process, which includes my ability and my client's ability to  
5 answer that lawsuit, and we will answer that lawsuit, and we  
6 can take up the 105 injunction issues at that time, but that's  
7 simply just not set for hearing this morning.

8 So, Your Honor, in getting a little bit now to kind of the  
9 context, and I will be brief, Mr. Daugherty's claim arises  
10 like many of the other creditors in this case, from a judgment  
11 that he rightfully and legally obtained and that Highland then  
12 fought tooth and nail to pay, and -- fought tooth and nail,  
13 sorry, not to pay, and worked really to make Mr. Daugherty's  
14 life utterly miserable.

15 As we noted in our 3018 brief that we filed last Friday,  
16 the Debtor knew how to carry out its strategy against Mr.  
17 Terry related to the Acis matter because they had done it to  
18 Mr. Daugherty first.

19 In 2011, after ten years of employment at Highland, Mr.  
20 Daugherty resigned for a number of reasons, including  
21 disagreements with Mr. Dondero about actions that Mr. Dondero  
22 was requesting Mr. Daugherty to take. Those actions, Your  
23 Honor, would later be related to the basis of the Redeemer  
24 Crusader arbitration awards and the basis of the claims that  
25 the Court approved last week.

1           Because of what had gone on with those transactions, Mr.  
2 Daugherty retained certain confidential information upon his  
3 departure in order to protect the record. Highland then sued  
4 Mr. Daugherty for breach of contract for retaining those  
5 documents, and Mr. Daugherty third-party sued an entity called  
6 Highland Employee Retention Assets, which everyone refers to  
7 as HERA. HERA had been set up during the wake of the Great  
8 Recession in 2008/2009 as a way for the Debtor to retain its  
9 top talent, and as a part of that, Mr. Daugherty received  
10 approximately 19 percent of the preferred units in HERA. And  
11 it's important to note, Your Honor, at this point that HERA,  
12 when it was set up, it was set up specifically and its  
13 governing documents were set up specifically such that Mr.  
14 Dondero, Mr. Okada, and Highland could not own preferred units  
15 in HERA.

16           So, during the trial, which we'll refer to as the Texas  
17 Trial, the Debtor sought, like it has in a lot of the other  
18 cases here, to denude and transfer the assets away from HERA  
19 so that if Daugherty ultimately got a judgment against HERA  
20 there wouldn't be any assets at HERA to be able to collect.  
21 And it did this by Mr. Dondero and Mr. Surgent putting  
22 together a scheme by which the Debtor would buy all of the  
23 preferred units in HERA except for Mr. Daugherty's.

24           So Highland purported to buy all of the interests in HERA  
25 except for Mr. Daugherty's, and then they transferred all the

1 assets from HERA to Highland.

2 As they were preparing for trial, though, Your Honor, they  
3 realized that if that were to come out in trial, that they  
4 transferred all of HERA's assets to Highland, that wouldn't  
5 look real great to a Texas jury and to a Texas trial. And so  
6 what they did is they purported to set up a "escrow account"  
7 with a firm called Abrams & Bayliss in Delaware. And during  
8 that trial, Mr. Dondero told the Texas judge and jury that  
9 they had transferred Mr. Daugherty's 19 percent assets, his  
10 portion of the 19 percent HERA assets, into this escrow. And  
11 Mr. Dondero testified at that trial that if Mr. Daugherty won,  
12 he would get the assets in the escrow.

13 Your Honor, that was just a lie, and we know it's a lie  
14 because of the documents in evidence that we got in the  
15 Delaware action later.

16 Now, if some of this is sounding familiar, you'll recall  
17 that in the Acis case in relation to Mr. Daugherty's claim in  
18 that case, I sought to take a number of depositions of  
19 Highland employees related to the transfer of these assets  
20 with the escrow. The Court will recall we had a hearing on a  
21 Motion to Quash certain subpoenas I was serving, and Mr.  
22 Leventon testified at that hearing.

23 And if the Court will recall, I asked Mr. Leventon how  
24 certain of these assets were transferred into the escrow, and  
25 one of those assets, Your Honor, that was supposed to be

1 transferred into the escrow were HERA's shares in Restoration  
2 Capital Partners.

3 Now, I know Your Honor is familiar with that asset,  
4 Restoration Capital Partners, because it's been the subject of  
5 some of the hearings during this case. But when I asked Mr.  
6 Leventon about the transfer of that Restoration Capital  
7 Partners, his answer was, It's fuzzy. And it's fuzzy, Your  
8 Honor, because it never happened.

9 Fast-forward now to the Delaware -- or sorry, fast-forward  
10 to the end of that trial. Mr. Daugherty obtained a judgment  
11 against HERA for \$2.6 million, plus pre- and post-judgment  
12 interest. That judgment is appealed and ultimately affirmed  
13 by the Appellate Court. Upon that appeal, upon the opinion  
14 being entered, the Debtor starts working to completely unwind  
15 that escrow on the day that the opinion was entered. There is  
16 internal correspondence between the Debtor and its lawyers and  
17 with the escrow agent Abrams & Bayliss and the Debtor's in-  
18 house counsel, Mr. Ellington, talking specifically about how  
19 Abrams & Bayliss is going to resign as the escrow agent and  
20 that all of the assets will then just be returned back to  
21 Highland.

22 And in the Delaware case, Your Honor, we challenged the  
23 privilege log to obtain those documents. And the Delaware  
24 court reviewed those documents *in camera*, and this is what she  
25 -- her finding was. She found that the crime fraud exception



1 to attorney-client privilege applied, and her ruling  
2 specifically was Debtor -- sorry, Daugherty has made a prima  
3 facie showing that a reasonable basis exists to believe that a  
4 fraud has been perpetrated and that Highland sought Abrams &  
5 Bayliss to serve as escrow agent and to provide legal analysis  
6 in furtherance of that fraud specifically to protect the  
7 escrowed assets from Daugherty while the Texas case was  
8 pending and then to transfer them back to Highland after the  
9 Texas verdict was finalized. I conclude my privileged  
10 Highland claims over Bayliss -- Abrams & Bayliss's legal  
11 advice regarding the escrow agent and Abrams & Bayliss's  
12 resignation has been stripped from the crime fraud exception.

13 So why do I kind of bring all of this up and how does this  
14 fit into the context, Your Honor? It's because these lawyers  
15 -- Mr. Leventon, Mr. Ellington, Mr. Surgent, the people, the  
16 nondebtors that are the subject of our lawsuit in Delaware --  
17 these are the same people that the Debtor is seeking to give  
18 releases to that was the big subject of yesterday's hearing,  
19 okay? These are the -- these are the releases of these  
20 individuals that put together the scheme to strip the escrow  
21 assets as to Mr. Daugherty --

22 MR. MORRIS: Your Honor, I really apologize, but we  
23 are now testifying. I've just got to lodge this objection.  
24 We're having extensive testimony about evidence that's not in  
25 the record, and we have arguments now that have absolutely

1 nothing to do with the motion. I thought this was going to be  
2 a brief opening, Your Honor. This is not proper.

3 THE COURT: All right. Relevance objection and --  
4 among other things. Your response, Mr. Kathman?

5 MR. KATHMAN: Your Honor, none of this is evidence,  
6 and Your Honor, I know, isn't going to take it as evidence.  
7 I'm just trying to explain. There was a big hearing  
8 yesterday, and a big part of that hearing yesterday was these  
9 releases. That was a big part of the hearing yesterday on the  
10 disclosure statement hearing. And those releases apply to the  
11 exact people that we're suing in Delaware. How does that tie  
12 into this motion, Your Honor, --

13 THE COURT: Okay. I overrule --

14 MR. KATHMAN: -- is those people --

15 THE COURT: -- the objection. You can go ahead. Go  
16 ahead.

17 MR. KATHMAN: Okay. Your Honor, and I'll tell you,  
18 I'm almost done.

19 It ties into this hearing, Your Honor, because these are  
20 the nondebtors. Mr. Leventon, Mr. Ellington, Mr. Surgent, and  
21 the lawyers that the Delaware Court found the crime fraud  
22 exception applied to -- Mr. Katz, Mr. Hurst -- in trial in  
23 Delaware. Mr. Uebler asked Mr. Dondero about these actions,  
24 and Mr. Dondero pointed the finger at his lawyers, both in-  
25 house and outside counsel, and said that he did all of that on

1 advice of counsel.

2 That's why we filed the second lawsuit, Your Honor. Those  
3 lawyers were a part of a fraud to take these assets out of the  
4 escrow account, and that's the basis of our lawsuit in  
5 Delaware, Your Honor. The stay does not apply to those  
6 people.

7 And so I'm asking Your Honor to confirm that the stay did  
8 not apply to those people so that we can sever the Debtor out  
9 of the litigation with those people. Mr. Dondero. And  
10 certain of those lawyers are not -- they're in a separate  
11 lawsuit, of which the Debtor is not a party. But Mr. Dondero  
12 and HERA are a part of a lawsuit with the Debtor that was in  
13 its second day of trial in Delaware. And so I'm asking the  
14 Court to allow us to sever the Debtor out of that litigation  
15 so we can pursue our claims against the nondebtor.

16 As I started, Fifth Circuit is abundantly clear it doesn't  
17 apply to nondebtors, and we believe Your Honor should confirm  
18 what the Fifth Circuit says and grant our motion to allow us  
19 to sever those parties so that we can proceed against the  
20 nondebtors in Delaware.

21 Thank you.

22 THE COURT: All right. Thank you. Mr. Morris, your  
23 opening statement?

24 MR. MORRIS: Yes, Your Honor. John Morris, Pachulski  
25 Stang Ziehl & Jones for the Debtor.

1 Context. Everyone wants to talk about context. Mr.  
2 Daugherty has a claim against the Debtor in this court. That  
3 claim will be litigated in this court. That claim is based  
4 almost exclusively, with the exception of a defamation claim  
5 and I think maybe a tax claim, on the very pleading that Mr.  
6 Kathman seeks to pursue in Delaware.

7 That claim is not only going to be litigated in this  
8 court, but it's the subject of a scheduling order that's been  
9 agreed upon by the parties, and it's going to be heard this  
10 spring. This is simply another instance, Your Honor, and at  
11 this point I hope the Court sees how hard the Debtor is trying  
12 to stop this flow of litigation.

13 Mr. Daugherty, he can make whatever motion he wants, but  
14 the fact of the matter is these two cases in Delaware are  
15 Cases No. 7 and Cases No. 8, and both of them implicate the  
16 Debtor itself. Severance is not going to change that. The  
17 debtor is going to be harmed if these cases proceed. This has  
18 nothing to do with the individuals, Your Honor, but the fact  
19 of the matter is that his claim in this court is based on  
20 these lawsuits, and these lawsuits arise from the exact same  
21 set of operative facts. Maybe they found out more allegations  
22 against more individuals, but like so many parties in this  
23 case, unfortunately, they just continued this scorched-earth  
24 practice that is going to continue to harm the Debtor.

25 This case, there's no urgency here. The status quo has

1 remained for over a year. In fact, Mr. Daugherty told the  
2 Court in Delaware over a year ago on the petition date that he  
3 was content to put the case on ice. He has done nothing for a  
4 year. There's no urgency here, right?

5 All he's looking for is a little leverage, Your Honor.  
6 That's all that's happening here. But the consequences of  
7 opening the floodgates and allowing him to proceed and giving  
8 him the comfort that he's seeking from this Court will be  
9 disastrous for the Debtor. It will -- the Debtor is going to  
10 be forced to participate in the process, even if it's not  
11 named, because Mr. Daugherty himself has alleged a unity of  
12 interest between the Debtor and the nondebtor Defendants. Mr.  
13 Daugherty himself has alleged that the Debtor participated in  
14 the conspiracy with the nondebtors.

15 There is no way to separate the Debtor from the nondebtor,  
16 so the Debtor will be forced to spend time and money. The  
17 Debtor will be forced to confront the possibility of  
18 preclusive rulings. The Debtor will be forced to, you know,  
19 devote more resources, to the detriment of all creditors in  
20 this case.

21 There is no reason to give this Plaintiff comfort. We  
22 have our adversary proceeding here. He is well aware of that.  
23 If necessary, (garbled) motion this afternoon for a TRO. I  
24 hope that's not necessary, but everybody is on notice as to  
25 exactly what is happening here. And there's no reason,

1 frankly, for this Court, six or eight weeks before  
2 confirmation, with a scheduling order in place for the  
3 litigation of Mr. Daugherty's claim, to upset the apple cart  
4 and just open the floodgates to yet more litigation. We think  
5 that would be disastrous for the Debtor, for its estate, and  
6 for all creditors.

7 Give me just one second, Your Honor. (Pause.) I just  
8 want to go through some of the factors that we cited in our  
9 papers to make the record quite clear as to what's going on  
10 here.

11 The allegations -- there can't be any dispute that the  
12 allegations in both pending Delaware actions are inextricably  
13 interwoven with the claim that's pending in this case. In  
14 fact, as I mentioned, the claim is based on the lawsuit. Both  
15 the lawsuits and the proof of claim are based on the  
16 allegation that Highland and the nondebtors conspired to  
17 transfer assets to prevent Mr. Daugherty from collecting on  
18 his judgment.

19 Your Honor, I must point out that the Debtor has conceded  
20 that Mr. Daugherty has an allowed proof of claim for the value  
21 of the judgment that he previously obtained for \$3.7 million.  
22 That's not even in dispute.

23 I would point out that Mr. Daugherty's expert in Delaware,  
24 as long as we're going to talk about Delaware, filed an expert  
25 report with damages of \$4 to \$5 million. We can challenge

1 that, but that's -- that's what he's looking to get in  
2 Delaware, and we've already conceded \$3.7 million of it, Your  
3 Honor.

4 Mr. Daugherty expressly alleges an identity of interests.  
5 He expressly alleges that Highland conspired with every single  
6 one of these nondebtor defendants. Mr. Daugherty specifically  
7 alleges that the corporate defendants, including the Debtor,  
8 HERA Assets, HERA Management, were all controlled by Mr.  
9 Dondero. If we open the floodgates here, we not only run the  
10 risk of preclusive rulings, not only cost the Debtors more,  
11 but you can be sure that the Debtor will face yet more  
12 indemnification claims from its employees. The Debtor will  
13 have to participate.

14 You know, let's talk about what the relief requested is  
15 here. He wants to sever the Debtor so that he can consolidate  
16 these two cases. How is that even possible? You've got one  
17 case that apparently is in the second day of trial, and you've  
18 got another case that's still in the pleading stage where  
19 there's a motion to dismiss pending. If you consolidate those  
20 cases, how do you do that consistent with due process. How  
21 can you do that? I mean, what do you tell the defendants in  
22 case number one? We've consolidated the case, but now you  
23 have to sit tight while I go through the pleading and the  
24 motion to dismiss and then discovery and wait for the case  
25 number two to come up to speed? Or do you tell the defendants

1 in case number two, We're going to just start now on day two  
2 of trial?

3 What they're asking for I don't even think was well  
4 thought out. But let's take it a step further. Let's say  
5 they did that, Your Honor. Let's say -- let's say they went  
6 tomorrow and they went to Delaware and everything -- they had  
7 their trial and it ended on Friday and they got a judgment.  
8 What do you think the chances are of an appeal? And then --  
9 and then what?

10 What happens in the spring? Do we have Mr. Daugherty tell  
11 this Court that we can't litigate his claim pursuant to the  
12 agreed-upon schedule because we have to wait for the outcome  
13 of the appeal? Or do we have Mr. Daugherty say, No, we're  
14 just -- for the second time, and run the risk of inconsistent  
15 verdicts, of running the risk of a waste of judicial  
16 resources?

17 How -- how does he even -- I can't even wrap my head  
18 around how this would even work. But even if he could come up  
19 with a theory about how it would work, it will harm the  
20 Debtor. Mr. Daugherty has a claim against the Debtor. It's  
21 scheduled to be heard in this court. It's an agreed-upon  
22 schedule. He hasn't sought any relief for over a year. Let  
23 him resolve his claim against the Debtor. That's why --  
24 that's why companies file for bankruptcy, to get that  
25 protection, to have their claims adjudicated in their



1 courtroom, where they chose to file.

2 And there is no way, there is simply no way -- and it's  
3 why -- it's why there's no mention of it at all by Mr.  
4 Daugherty or his counsel -- there is no way to separate the  
5 Debtor from the nondebtors in this case.

6 And so, Your Honor, I think the request ought to be  
7 denied. I'll move at this time for a TRO based on the  
8 argument that I've made. If Your Honor wants me to file a  
9 formal motion on shortened notice, I'm happy to do that. But  
10 the Debtor -- Mr. Daugherty is now on notice. We've made our  
11 motion. We've made our cross-motion. We have filed our  
12 adversary proceeding. He knows exactly what our position is  
13 here, so there is no surprise. Okay?

14 But we, we've got to stop this litigation train, Your  
15 Honor. There's just no reason to do it now. Thank you.

16 MR. KATHMAN: Your Honor, may I respond?

17 THE COURT: Well, I mean, at this point, I'd just  
18 like to know what evidence you're each going to rely on today.  
19 I don't know if it's purely legal argument, or are you going  
20 to put on evidence?

21 MR. KATHMAN: I'm just going to rely on our  
22 declaration we filed in support of our motion, Your Honor. I  
23 don't intend to put on any evidence. And I'd like to resp...  
24 and here's the reason why, Your Honor. Is I think what you  
25 heard Mr. Morris arguing there is why the Debtor shouldn't be

1 severed, okay? Before Your Honor today is not a motion to  
2 sever the Debtor. Before Your Honor is a motion to confirm  
3 that the stay does not apply to nondebtors so that we can go  
4 seek that relief from Delaware.

5 Those arguments are inextricably intertwined, and the  
6 Debtor shouldn't be severed out, all those arguments for the  
7 court in Delaware when we file our motion to sever in  
8 Delaware. The Debtor says it wants Your Honor to hear that.  
9 They could have removed that case in Delaware when they filed  
10 the case. If they wanted those issues to be heard by a  
11 bankruptcy court, if they wanted those issues to be heard by  
12 Your Honor, they could have removed the case and had it  
13 transferred down here. They didn't do that. They left the  
14 case in Delaware.

15 So they're now trying to say, when I'm trying to pick the  
16 forum, when we're going to forum that they left at -- they  
17 didn't remove the case, they didn't transfer it to the case,  
18 okay, they didn't transfer it to Your Honor -- we're going to  
19 go to that forum, Delaware, and litigate these issues. And so  
20 the arguments -- the overwhelming majority of Mr. Morris's  
21 arguments were these are inextricably intertwined, there's  
22 identity of interest -- all those issues are severance issues.  
23 They should be raised at that time.

24 Before Your Honor today, and the only motion that's before  
25 Your Honor today, is a motion to confirm that the stay does

1 not apply to nondebtors, and that if we were to go seek that  
2 severance motion in Delaware, we are not violating the  
3 automatic stay. That's just pure legal argument, Your Honor.

4 THE COURT: Okay. Let me clarify a few points here.  
5 You're wanting not just confirmation that the stay would not  
6 apply to severance of the Debtor, but you're also wanting sort  
7 of like a comfort order that you can go forward after  
8 severance, if permitted by the Delaware court, against all  
9 these nondebtors, okay?

10 MR. KATHMAN: Correct, Your Honor. Correct.

11 THE COURT: All right. Let me clarify that I  
12 understand the nature of the lawsuit. There is the first what  
13 I'll call main lawsuit where Mr. Daugherty sued Highland, the  
14 Debtor, plus Highland Employee Retention Assets, Highland ERA  
15 Management, and James Dondero. And I think there may have  
16 been a third-party intervenor that has another Highland ERA  
17 name. And that's the one that Highland, on the third day of  
18 trial, --

19 MR. KATHMAN: Correct.

20 THE COURT: -- filed bankruptcy. Okay. So that's  
21 lawsuit number one.

22 And then lawsuit number two involves, I think, all of  
23 these very same parties, plus the law firm Hunton Andrews  
24 Kurth, lawyer Marc or Marci Katz, Michael Hurst, in-house  
25 lawyer Scott Ellington, employee, and in-house lawyer Tom

1 Surgent, and then Isaac Leventon, okay? So that's the other  
2 lawsuit that wasn't as far along?

3 MR. KATHMAN: Correct.

4 THE COURT: Now, there's one theory that I, you know,  
5 I don't hear anyone talking about, so I'm assuming it doesn't  
6 apply, but I'll ask. While obviously 362(a)(1) doesn't apply  
7 as a technical matter as to suits against nondebtors, if the  
8 claims in the lawsuits happen to be property of the estate,  
9 causes of action that, you know, all of a sudden become  
10 property of the estate once there's a bankruptcy filed, then  
11 under 362(a)(3) there may be a theory of the automatic stay  
12 being implicated.

13 I'm taking it that that is not a concern here. These are  
14 all direct claims of Mr. Daugherty for harm directly to him,  
15 not fraudulent transfer claims or anything that might be a  
16 derivative claim. I'm assuming the Creditor's Committee would  
17 have weighed in if that concern was there.

18 MR. KATHMAN: Correct. No *S.I. Acquisition*-type  
19 issues, Your Honor.

20 There are fraudulent transfer claims alleged, but they're  
21 not fraudulent transfer claims of the Debtor. It's where the  
22 Debtor is the recipient of the fraudulent transfer. In other  
23 words, the Debtor was not the one -- Highland was not the one  
24 making the fraudulent transfer.

25 THE COURT: All right. Okay.

1 MR. KATHMAN: That would be -- that would be an *S.I.*  
2 *Acquisition*-type situation.

3 THE COURT: Okay. Okay.

4 MR. MORRIS: Your Honor, may I --

5 THE COURT: All right. So I am looking at the  
6 declaration of Pat Daugherty that was attached to your motion.  
7 You're relying on that as your evidence.

8 All right. I can't remember. Did I cut you off in the  
9 middle of a sentence with my questions? Were you through with  
10 your --

11 MR. KATHMAN: Your Honor, I just want to check my  
12 notes. I'm sorry.

13 The only other thing, Your Honor, I just would add is, to  
14 the extent that they try to make the identity of interest  
15 argument here, to the extent they try to make that argument,  
16 the law in this district, as Your Honor is aware, *Seatco, In*  
17 *re Bernhard Steiner*, and *In re Couture Hotel Corporation*, puts  
18 that bar at -- identity of interest at a very, very -- I would  
19 say extremely high bar in this district.

20 In *Bernhard Steiner*, it was actually Mr. Steiner that  
21 makes the pianos, Bernhard Steiner, that that the injunction  
22 was granted in favor of. And in *Seatco*, it was a single-  
23 member LLC where he was the only employee making the seats.  
24 And in *Couture Hotel Corporation*, Judge Houser specifically  
25 talked about those two different cases and talked about, at

1 least in this district, the very, very high bar it is for  
2 identity of interest.

3 It's not merely just, hey, it would disrupt the debtor.  
4 It's not just merely these are employees or people that are  
5 important to the debtor. It's where, when it says identity of  
6 interest in this district, it means essentially singularly the  
7 same person, like in *Bernhard Steiner* and in *Seatco*. And  
8 obviously, none of these nondebtors are -- these are lawyers.  
9 They certainly don't have that identity of interest, at least  
10 that this district has set as the standard for identity of  
11 interest in order to obtain this sort of injunction.

12 But again, that's not really before the Court this  
13 morning. And to the extent that Mr. Morris is now kind of  
14 making an oral motion for a temporary restraining order,  
15 obviously, in order to get a temporary restraining order, even  
16 a 105 injunction, you have to meet all of the four  
17 requirements that go to success on the merits, all of those  
18 things. And Your Honor, that's just not proper to make that  
19 on the record here. They filed a lawsuit. That's the way  
20 they proceeded. We have an opportunity to answer. And we can  
21 take up the 105 injunction at that time if they still want to  
22 pursue that.

23 THE COURT: All right.

24 MR. MORRIS: Your Honor, if I may?

25 THE COURT: You may. Are you going to have evidence

1     yourself, Mr. Morris?

2                 MR. MORRIS: Not today, Your Honor.

3                 THE COURT: Okay.

4                 MR. MORRIS: It is undisputed that the sole recipient  
5     of the alleged fraudulent transfers was the Debtor. There is  
6     no way to try a fraudulent transfer case without preclusive --  
7     without causing preclusive rulings against the Debtor.  
8     There's just no way that that's going to happen.

9                 With respect to the assertion on the identify of interest,  
10    I find it very ironic. If you just look at the pleadings,  
11    Your Honor, it's Mr. Daugherty who alleges that there's a  
12    unity of -- an identity -- he specifically alleges that they  
13    were controlled by Mr. -- that the Debtor was controlled. He  
14    specifically alleges that they were all part and parcel of the  
15    same conspiracy. So to hear them running away from the  
16    identity of interest is just contradicted by the allegations  
17    that they make in their very own pleading.

18                Finally, Your Honor, with respect to severance, I daresay  
19    that this Court -- actually, a couple of more points.  
20    Severance, you know, this Court is the one who should be  
21    deciding whether this Debtor is subject to claims elsewhere.  
22    I mean, what if the court -- what if the Delaware court says,  
23    I just -- I don't feel like severing? Does he get to proceed  
24    against the Debtor in that event? Because, after all, the  
25    Delaware court is making the decision. That's -- that court

1 is not supposed -- this Court is supposed to be the one that  
2 decides who gets to proceed against the Debtor. And the Court  
3 should not allow Mr. Daugherty at this point to go against the  
4 Debtor in this case.

5 Your Honor also made, I think, a pretty good point on the  
6 claims that are being adjudicated in that case. It will  
7 affect the Debtor's estate, and the stay really does apply.  
8 How will it affect the Debtor's estate? It will affect the  
9 Debtor's estate through the assertion, as I said before, of  
10 the indemnification claims.

11 THE COURT: Let me --

12 MR. MORRIS: These employees have already --

13 THE COURT: Let me --

14 MR. MORRIS: Yeah.

15 THE COURT: -- interject. That makes me go back to  
16 Mr. Kathman's argument that, you know, the Debtor has had --  
17 or the nondebtor defendants have had over a year now to remove  
18 the Delaware actions to this Court if they wanted to make sure  
19 there weren't, you know, differing rulings, duplicative  
20 litigation, and nobody has.

21 MR. MORRIS: I would say, Your Honor, I would just  
22 flip it and say they could have done the same thing. What the  
23 Debtor did is rely on the representation made on the record on  
24 the petition date in the Delaware Chancery Court by Mr.  
25 Daugherty's counsel that he was putting this case on ice.



1 That's what we relied upon. And the only thing that's  
2 happened in case number two, the only thing that's happened in  
3 case number two is a motion to dismiss.

4 There's been no discovery. The Debtor hasn't been  
5 impacted by case number two. And if the Court wants to -- you  
6 know, if the Court wants the motion to dismiss to proceed, the  
7 Debtor has no objection. But nothing else should happen.  
8 Nothing else should happen.

9 We relied on Mr. Daugherty's counsel's representations,  
10 and I think it's grossly unfair for any suggestion that the  
11 Debtor has sat on its hands. We received this motion. We  
12 will respond to it quickly, both with an adversary proceeding  
13 and an opposition. But we relied on the statement on the  
14 record by Mr. Daugherty's counsel, and I quote, that he was  
15 willing to put this case on ice. And that's what we did.

16 THE COURT: Okay. Anything else?

17 MR. KATHMAN: And the only other thing I would say,  
18 Your Honor, is Mr. Morris obviously is raising a preclusion  
19 issue. I've argued that issue when I represent debtors as  
20 well. But Your Honor is familiar with the elements of issue  
21 preclusion. You've written a number of opinions on it. The  
22 *Clem* opinion, and just recently the *Dean* opinion I think from  
23 just about two months ago. One of the elements of preclusion,  
24 that the parties were cast as adversaries. The Debtor is not  
25 a party to the litigation that we're going to go pursue in

1 Delaware, one. And two, Mr. Morris raised the issue, what if  
2 the Delaware court decides to let us proceed against the  
3 Debtor up there? Well, we can't do that, Your Honor, because  
4 the actions against the Debtor are stayed. That's why we're  
5 severing the Debtor out of the case.

6 So the case against the Debtor would be severed, and that  
7 case would remain "on ice" because it's stayed by nature of  
8 the automatic stay.

9 What we're asking is to remove the nondebtors from the  
10 entity so we can proceed against those -- from those --  
11 against those entities.

12 If they want to, again, if they want to argue that they  
13 shouldn't be severed, they can go make those arguments in  
14 Delaware, but before Your Honor is really just that we confirm  
15 what the -- what the Fifth Circuit law is. Thank you.

16 THE COURT: All right. I'm going to grant this  
17 motion. Obviously, 362 is the governing authority and --  
18 construing 362, and guided by the cases that construe 362,  
19 such as the *Wedgeworth v. Fibreboard Corp.* case mentioned in  
20 the pleadings, I find that and conclude that the stay does not  
21 apply to severance of a debtor, mere severance of a debtor in  
22 a pre-petition lawsuit, and I don't believe it applies in the  
23 context of this case to any of the nondebtor defendants.

24 So I'm giving you a comfort order primarily, but I'll also  
25 rule that there is cause under 362(d), to the extent I am

1 wrong and a broad interpretation of the stay would be that the  
2 stay does somehow apply here, I find cause to lift the stay to  
3 allow Mr. Daugherty to go forward against all of the nondebtor  
4 defendants.

5       You know, I find a lot of aspects of this -- I don't know  
6 what the word is to use. I mean, I guess, ironic. You know,  
7 on the one hand, Mr. Morris said it's ironic to hear  
8 Daugherty's counsel running away from the identity of interest  
9 argument, but it's also to me ironic to hear Debtor's  
10 counseling running to that, when all through the history of  
11 this bankruptcy I feel like people cringe when you refer to a  
12 Highland affiliate and want to distance themselves from saying  
13 some entity in the Highland umbrella is a related party or  
14 anything like that. So there's a lot of irony to go around, I  
15 suppose, here.

16       And I do find it -- I understand if the comment was made,  
17 we're going to put this lawsuit or the these lawsuits on ice,  
18 I can understand that possibly being a reason for the Debtor  
19 not to remove these lawsuits. But the fact is, if they're  
20 worried about inconsistent findings, preclusive findings, you  
21 know, duplication of effort, any expense to the Debtor in  
22 having to pay attention to what's going on in these Delaware  
23 lawsuits as they go forward, the Debtor could remove.  
24 Nondebtor defendants could remove. It sounds like there is a  
25 related-to argument that is being articulated by the Debtor

1 because of the fact that indemnification claims might arise  
2 back against the Debtor if these nondebtor defendants are  
3 imposed with liability. So there's a simple solution here to  
4 avoid all of the things the Debtor seems to be worried about.

5 So, and I'll just throw in one last bit of food for  
6 thought. I think everybody knows how much I wish that a grand  
7 compromise would be reached in this case. And you know, we  
8 have a couple of very significant compromises that have  
9 recently been approved, but we still have these very large  
10 litigation claims. And the Debtor has had a year now, close  
11 to a year now, to knock some of these out, you know, maybe  
12 reach some compromises with some of the related Highland  
13 parties and officers, to maybe participate in the plan with  
14 some sort of contribution, and it's just not happening. It's  
15 not happening. Now we're looking at a plan that's still very  
16 contested, with some large litigation claims.

17 So, at this point, I would be hard-pressed to protect any  
18 nondebtor defendants who aren't ponying up something to the  
19 whole plan reorganization process. So that's not an advisory  
20 opinion. That's just letting you know where I am at the  
21 moment on nondebtor defendants seeking some sort of extended  
22 stay to protect them or allegedly the Debtor.

23 So, anyway, I reserve the right to supplement and amend in  
24 my written ruling.

25 Mr. Kathman, will you please upload an order?

1 MR. KATHMAN: I will, Your Honor. Thank you.

2 THE COURT: All right. Thank you. We stand  
3 adjourned.

4 THE CLERK: All rise.

5 (Proceedings concluded at 10:25 a.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript to  
the best of my ability from the electronic sound recording of  
the proceedings in the above-entitled matter.

22

**/s/ Kathy Rehling**

**10/28/2020**

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\_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

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